(1)

Supreme Court, U.S.
FILED

No. 02-1717

MAY 16 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JUAN HERNANDEZ,

Petitioner,

v.

CRAWFORD BUILDING MATERIAL CO., etc.,

Respondent.

ROSA MALVEAU, *et al.*,

Petitioners,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY B. GARRIGAN
STUCKY, GARRIGAN & CASTETTER
2803 North Street
P.O. Box 631902
Nacogdoches, TX 75963-1902
(936) 560-6020

NANCY PICARD
ROBEIN, URANN & LURYE
2540 Severn Avenue
Suite 400
Metairie, LA 70002
(504) 885-9994

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

113 pp

QUESTIONS PRESENTED*

(1) Do the anti-retaliation provisions of Title VII and the Age Discrimination in Employment Act, which forbid an employer from discriminating against an employee for seeking to enforce his or her rights under Title VII and ADEA respectively, actually permit such retaliation so long as the employer's actions do not constitute an "ultimate employment decision"?

(2) Does 42 U.S.C. § 1981, insofar as it forbids retaliation against employees for opposing discrimination forbidden by that section, actually permit such retaliation so long as the employer's actions do not constitute an "ultimate employment decision"?

(3) In a section 1983 action to enforce the First Amendment, may a public employer retaliate against employees for engaging in constitutionally protected speech so long as that retaliation does not constitute either an "ultimate employment decision" or a reprimand or disciplinary action?

---

* Both *Hernandez* and *Malveau* involve claims under the anti-retaliation provisions of Title VII. Hernandez also asserted a retaliation claim under the ADEA and section 1981. Malveau, et al., also asserted a retaliation claim under section 1983.

PARTIES

The parties in *Hernandez* are Juan Hernandez and Crawford Building Material Company, doing business as Crawford's Discount Carpet Home and Floor Center.

The petitioners in *Malveau* (decided in the court of appeals sub nom. *Banks v. East Baton Parish School Board*) are Rosa Malveau, Tina Brooks, Shirley Brown, Annette J. Gray, Mary Holmes, Annie Johnson, Amy Lane, Dorothy McPipe, Alma Newman, Maggie Tucker, Bertha Twine, Berthella Wallace, Edna Welch, and Nellie Williams. The respondents in *Malveau* are the East Baton Rouge Parish School Board, Ingrid Kelley, Warren L. Pratt, Jr., Press L. Robinson, Sr., Dr., Jacqueline Mims, Patricia Hayne-Smith, Noel Hammatt, Roger Moser, Daniel R. Henderson, Eldon R. Ledoux, Dalton Devall, William P. Black and James Manley.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Hernandez	3
Banks/Malveau	5
REASONS FOR GRANTING THE WRIT	8
I. THERE IS A WIDELY RECOGNIZED CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHETHER FEDERAL LAWS PROTECTING EMPLOYEES FROM RETALIATION ACTUALLY PERMIT RETALIATION SO LONG AS IT DOES NOT TAKE THE FORM OF AN "ULTIMATE EMPLOYMENT DECISION"	8
II. FEDERAL AGENCIES IN BRIEFS FILED IN THE COURTS OF APPEALS ARE ADVOCATING CONFLICTING INTERPRETATIONS OF THE LAW	21
III. THE DECISIONS BELOW ARE IN CONFLICT WITH THIS COURT'S DECISION IN *ROBINSON V. SHELL OIL CO.*, 519 U.S. 337 (1997)	27
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES:

Arnold v. United States Dept. of the Interior, 213 F.3d 193 (5th Cir. 2000) 22

Bass v. Board of County Comm'rs, 256 F.3d 1095 (11th Cir. 2001) 15, 20

Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996) 19, 21

Burger v. Central Apartment Mgmt., 168 F.3d 875 (5th Cir. 1999) 12, 13

Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987) 18

Connecticut Light & Power v. Secretary of Labor, 85 F.3d 89 (2d Cir. 1996) 26, 27

Connell v. Bank of Boston, 924 F.2d 1169 (1st Cir. 1991) 16

Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995) 8, 9, 11

Felton v. Polles, 315 F.3d 470 (5th Cir. 2002) 12

Foley v. University of Houston Syst., 324 F.3d 310 (5th Cir. 2003) 10, 12

Garber v. New York City Police Dept., 1998 WL 514222 *2 (2d Cir., June 12, 1998) 17

Graham v. State Farm Mutual Ins., 193 F.3d 1274 (11th Cir. 1999) 15

Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002) 10

Gu v. Boston Police Dept., 312 F.3d 6 (1st Cir. 2002) 16

Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998) 19

TABLE OF AUTHORITIES – Continued

Page

Gupta v. Florida Bd. of Regents, 212 F.3d 571 (11th Cir. 2000) 15

Gustafson, Inc. v. Bunch, 244 F.3d 134 (5th Cir. 2000) 27

Hernandez-Torres v. Intercontinental Trading, 158 F.3d 43 (1st Cir. 1998) 16

Heuer v. Weil-McLain, 203 F.3d 1021 (7th Cir. 2000) 18

Hollins v. Atlantic Co., 188 F.3d 652 (6th Cir. 1999) 17

Hunt v. Rapides Healthcare Syst., 277 F.3d 757 (5th Cir. 2002) 9, 12

Jeffries v. State of Kansas, 147 F.3d 1220 (10th Cir. 1998) 19, 20

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) 20

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996) 18

Ledergerber v. Stangler, 122 F.3d 1142 (8th Cir. 1997) 19

Manning v. Metropolitan Life Ins., 127 F.3d 686 (8th Cir. 1997) 19, 20

Marrero v. Goya of Puerto Rico, 304 F.3d 7 (1st Cir. 2002) 16

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997) 9, 10, 11, 17

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 9

Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) 10

TABLE OF AUTHORITIES – Continued

Page

Mota v. University of Tex. Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001) 9

Passer v. American Chemical Soc., 935 F.2d 322 (D.C. Cir. 1991) 19

Preda v. Nissho Iwai American Corp., 128 F.3d 789 (2d Cir. 1997) 18

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) ... 14, 21, 22

Richardson v. New York State Dept. of Correctional Serv., 180 F.3d 426 (2d Cir. 1999) 17, 20

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) .....*passim*

Scusa v. Nestle U.S.A. Co., 181 F.3d 958 (8th Cir. 1999) 20

Shannon v. Bellsouth Telecommunications, 292 F.3d 712 (11th Cir. 2002) 15

Smart v. Ball State Univ., 89 F.3d 437 (7th Cir. 1996) 18

Smith v. St. Louis Univ., 109 F.3d 1261 (8th Cir. 1997) 20

Sweeney v. West, 149 F.3d 550 (7th Cir. 1996) 20

Thomas v. Texas Dept. of Criminal Justice, 220 F.3d 389 (5th Cir. 2000) 10

Torres v. Pisano, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997) 16

Trujillo v. New Mexico Dept. of Corrections, 1999 WL 194151 *3 (10th Cir., April 8, 1999) 20

Vasquez v. County of Los Angeles, 307 F.3d 884 (9th Cir. 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001) 15, 21, 22, 27

Walker v. Thompson, 214 F.3d 615 (5th Cir. 2000) 10

Wanamaker v. Columbian Rope Co., 108 F.3d 462 (2d Cir. 1997) 17

Watts v. Kroger Co., 170 F.3d 505 (5th Cir. 1999) 9, 10

Welsh v. Derwinski, 14 F.3d 85 (1st Cir. 1994) 16, 21, 22

White v. Burlington Northern & Santa Fe Ry. Co., 310 F.3d 443 (6th Cir. 2002), reh. granted, 321 F.3d 1203 (6th Cir. 2003) 17, 20, 25

White v. New Hampshire Dept. of Corrections, 221 F.3d 254 (1st Cir. 2000) 16

Wideman v. Wal-Mart Stores, 141 F.3d 1453 (11th Cir. 1998) 15, 23, 28

Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 1994) 16

Zaffuto v. City of Hammond, 308 F.3d 485 (5th Cir. 2002) 13

STATUTES:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623(d) ..... *passim*

42 U.S.C. § 1981 ..... 2, 3, 12

42 U.S.C. § 1983 ..... 2, 7, 8, 12

42 U.S.C. § 2000e-3(a) ..... *passim*

42 U.S.C. § 5851(a) 26

Texas Penal Code § 12.34 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners Juan Hernandez, Rosa Malveau, et al., respectfully pray that this Court grant a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in *Hernandez v. Crawford Building Material Co.* on February 21, 2003 and entered in *Banks v. East Baton Rouge Parish School Board* on February 19, 2003.

OPINIONS BELOW

In *Hernandez* the February 21, 2003 opinion of the court of appeals is reported at 321 F.3d 528 (5th Cir. 2003), and is reprinted in the Appendix to the petition. (1a-11a). The October 27, 2001 order of the district court, which is not officially reported, is reprinted at pp. 12a-19a of the Appendix. The August 9, 2001 decision of the district court, which is not officially reported, is set out in pp. 20a-29a of the Appendix.

In *Banks* the February 19, 2003 opinion of the court of appeals is reported at 320 F.3d 570 (5th Cir. 2003), and is reprinted in the Appendix to the petition. (30a-50a). The June 5, 2001 opinion of the district court, which is not officially reported, is set out at pp. 62a-75a of the Appendix. The December 12, 2001 opinion of the district court, which is not officially reported, is set out at pp. 51a-60a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals in *Hernandez* was entered on February 21, 2003. The decision of the court of appeals in *Banks* was entered on February 19, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), provides in pertinent part:

> It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under this Act.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Section 1983 of 41 U.S.C. provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State . . . subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress. . . .

STATEMENT OF THE CASE

Hernandez

Petitioner was a long time employee of respondent Crawford Building Material. In 1999 Crawford dismissed Hernandez from the position he then held at its warehouse. Hernandez filed charges with the EEOC and Texas Commission on Human Rights, alleging that he had been dismissed because of his age, race and national origin. When the Commissions were unable to resolve the matter, Hernandez filed suit in federal district court, alleging discrimination in violation of Title VII and the Age Discrimination in Employment Act.

Within a month of the filing of that federal complaint, Crawford filed a counterclaim which asserted that many years earlier Hernandez had taken some property owned by Crawford. The counterclaim did not merely seek damages for an alleged act of conversion, but accused Hernandez of "theft of the grade of third degree or higher."[1] Hernandez, in response, amended his complaint to allege that the counterclaim itself had been filed to retaliate against Hernandez for commencing the original federal action. That retaliation, the amended complaint asserted, violated section 704(a) of Title VII, section 4(d) of the ADEA, and 42 U.S.C. § 1981.

---

[1] Under Texas law that felony carries a penalty of two to ten years imprisonment. Texas Penal Code § 12.34.

Crawford's counterclaim was dismissed on summary judgment. The district court held that Crawford "cannot show . . . specifically, or even generally, what was stolen. Next, Crawford cannot provide evidence that anything allegedly missing was taken by Hernandez as opposed to anyone else." (App. 27a).

The case proceeded to trial on Hernandez' retaliation and dismissal claims. Crawford admitted that its theft allegation had been triggered by Hernandez' lawsuit. (App. 25a). Hernandez offered substantial evidence that the filing of the counterclaim, particularly the public allegation of serious criminal conduct, had caused him substantial injury. The jury rejected Hernandez' dismissal claim, but concluded that Crawford had filed the counterclaim in bad faith in retaliation for Hernandez' commencement of his federal action. The jury found that the counterclaim had caused $20,000 in actual damages, and also awarded $55,000 in punitive damages.

Following the jury verdict, Crawford moved for judgment as a matter of law. In that post-trial motion Crawford for the first time contended that the anti-retaliation provision of Title VII does not forbid an employer from filing a bad faith counterclaim as a method of retaliating against a plaintiff for opposing unlawful discrimination. Because Crawford had not objected to the jury instruction on the retaliation claim, the verdict could be overturned only if the retaliation instruction was "plain error." The district court concluded that the instruction was not plain error. (App. 14 n.1).

The court of appeals reversed. The appellate court applied the Fifth Circuit's longstanding narrow interpretation of the anti-retaliation provisions of Title VII, the ADEA and section 1981. Under that interpretation, retaliation is only unlawful if it takes the form of what the Fifth Circuit characterizes as an "ultimate employment decision." Under Fifth Circuit precedent other forms of retaliation are entirely lawful. The court of appeals

concluded that the retaliatory filing of a bad faith counterclaim was not an "ultimate employment decision," and thus under Title VII, section 1981 and the ADEA was a permissible method of retaliation. (App. 9a). The appellate court also concluded that the legality of that form of retaliation was so clear that the jury instruction in question was indeed plain error. (App. 10a).

Banks/Malveau

Petitioner Malveau and thirteen other named plaintiffs in *Banks* seek review of that decision. The original lead plaintiff, Dorothy Banks, was by agreement of the parties dismissed from the case while it was pending in the court of appeals.

As of 1992 the East Baton Rouge School Board employed janitors in three capacities: "Janitor I," "Janitor II," and "Janitor III." The Janitor I employees were virtually all women (App. 32a); they worked part-time for six hours a day, nine months of the year. The Janitor II and Janitor III employees were virtually all men;[2] they were employed for the entire year and worked eight hours a day. In 1992 the Board decided to further downgrade the status of the virtually all female Janitor Is, reducing their work to four hours a day, and eliminating their benefits. (App. 32a-33a).

A number of the female Janitor I workers, including all of the petitioners in this case, brought suit in 1993 in Louisiana state court, alleging that these changes discriminated on the basis of gender in violation of Louisiana law. While that state court action was pending, the United

[2] As of 1992 208 of the 234 Janitor II workers and all of the 33 Janitor III workers were men. Doc. #83, Exhibits 5 and 19.

States Department of Justice undertook an investigation of whether the School Board had discriminated against women, in violation of Title VII, by excluding them from the Janitor II and Janitor III positions. In 1997 the Department of Justice and the School Board entered into a consent decree. Under that decree the Board created two new full-time positions with benefits, "Janitor" and "Lead Janitor." Employees in the old Janitor I, II or III jobs could remain in those classifications, but all future promotions (or hiring) were into one of these new positions. Under the Decree the School Board agreed to provide an opportunity to be "promoted to the new [full-time] Janitor position" to all "interested and qualified incumbent employees in the [part-time] Janitor I . . . positions." (App. 35a).

After agreeing to the Consent Decree, however, the School Board allegedly took several steps that effectively precluded the women in Janitor I from moving into the new Janitor position. First, the Board required most of the women in Janitor I positions to risk dismissal in order to obtain the promotion to Janitor. The Board required anyone seeking to promote from Janitor I to Janitor to pass a reading examination. Of the women in Janitor I who initially took the examination, only one passed. The School Board advised the others that they would have to give up their current jobs as Janitor I in order to be eligible to take the test again. They could move temporarily into the position of a probationary Janitor, but if they failed the test a second time, they would be fired. (App. 35a-36a). Only one Janitor I opted to become a probationary Janitor.

Second, if any of the women accepted the new Janitor position on a probationary basis, they would have to begin at the lowest pay level (the so-called "zero Step") for Janitors. This meant that any woman who obtained that "promotion" would be subject to a severe reduction in her hourly pay. For example, petitioner Rosa Malveau, who made $10.90 as a Janitor I (Step 15), would have been paid only $5.82 an hour if she promoted to the position of

Janitor (Step 0). (App. 39a n.6). As a Janitor, Malveau would have worked 40 hours a week, rather than only 20 hours a week as a Janitor I. But her resulting salary would have risen from $218 a week only to $232 a week, an increase of only $14 for working an additional 20 hours. Unlike this pay rate reduction, the Board's general promotion policy was to place a promoted employee at whatever pay Step would yield a rate 5% higher than his or her prior hourly rate. (App. 39a n.6).

Malveau and fourteen other present or former Janitor I female employees[3] brought the current action, alleging that these two new rules were adopted to retaliate against them for having filed the original 1993 state court action. Such retaliation, their complaint alleged, violated section 704(a) of Title VII, and was a violation of the First Amendment actionable under 42 U.S.C. § 1983. They asserted, specifically, that a high ranking School Board official had explained the Board's action by commenting, "That's what you get for filing a lawsuit." (App. 36a). The petitioners who were still in the Janitor I position objected to the test and the pass-or-be-fired rule. All of the petitioners, including several who ultimately had become Janitors, attacked the salary reduction that was imposed under the Board's plan.

The district court dismissed both claims, holding that the retaliatory practices alleged by the petitioners did not violate Title VII. The court concluded that none of the alleged retaliatory acts were "ultimate employment decisions," and thus none of them were forbidden by the anti-retaliation provision of Title VII. (App. 71a-73a). In a later ruling, the district court decided for similar reasons that the School Board's actions were not actionable under section 1983. (App. 58a-60a).

---

[3] One of the original named plaintiffs, Dorothy Banks, was subsequently dismissed as a plaintiff.

On appeal the Fifth Circuit reiterated that Circuit's longstanding position that section 704(a) forbids only those retaliatory practices which constitute an "ultimate employment decision." (App. 38a). The panel concluded that none of the retaliatory practices alleged by the *Banks* petitioners constituted ultimate employment decisions. (App. 39a-43a). The court of appeals concluded that a similar limitation was applicable where a government employee asserted that she had been retaliated against for actions protected by the First Amendment. Such retaliation was actionable, the court ruled, only if it constituted an ultimate employment decision or took the form of a reprimand or other disciplinary action. (App. 47a-49a). Because neither condition was satisfied, the Fifth Circuit concluded that petitioners' section 1983 action also had to be dismissed. (App. 49a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WIDELY RECOGNIZED CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHETHER FEDERAL LAWS PROTECTING EMPLOYEES FROM RETALIATION ACTUALLY PERMIT RETALIATION SO LONG AS IT DOES NOT TAKE THE FORM OF AN "ULTIMATE EMPLOYMENT DECISION"

(1) This case concerns a well-established Fifth Circuit limitation on the protections afforded by the anti-retaliation provisions of federal law. Since 1995 the Fifth Circuit has insisted that these anti-retaliation provisions forbid only those acts of retaliation which constitute what that circuit labels "ultimate employment decisions." *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995). This is avowedly a "strict interpretation" of federal anti-retaliation statutes. (App. 9a). "Ultimate employment decisions" are limited to acts "such as hiring, granting leave, discharging, promoting and compensating." 77 F.3d at 781-82. An employer may retaliate against an individual for protected activity

so long as the method of retaliation does not involve an ultimate employment decision. As the panel in the instant case observed, the Fifth Circuit since 1995 has identified a wide variety of retaliatory practices which it deems legal. (App. 8a n.2).

On the Fifth Circuit's view, section 704(a) permits as methods of retaliation practices which would be illegal under section 706(a)(2) of Title VII if taken because of the victim's sex, race, or national origin. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997). *Mattern*, for example, held that section 704(a) permits the use of harassment as a method of retaliation, 104 F.3d at 707-709; see *Mota v. University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001) (retaliatory ostracism permitted). The court of appeals in *Mattern* did not question the jury's finding in that case that the retaliatory harassment had caused the plaintiff $50,000 in damages. Similarly severe or pervasive harassment on the basis of gender or race, on the other hand, is indisputably unlawful. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Other types of retaliatory practices which the Fifth Circuit has held are not "ultimate employment decisions," and which in that circuit can lawfully be used to retaliate against (or threaten) current or former employees, include refusing to consider an employee for a promotion,[4] denying job training,[5] deliberately changing a worker's schedule so that she has to give up a second job,[6] moving a worker from the day to the night shift,[7] giving the worker less

---

[4] *Mattern*, 104 F.3d at 707-08.

[5] *Dollis*, 77 F.3d at 779, 782.

[6] *Watts v. Kroger Co.*, 170 F.3d 505, 508, 510 (5th Cir. 1999).

[7] *Hunt v. Rapides Healthcare Syst.*, 277 F.3d 757, 769 (5th Cir. 2002).

responsible or desirable duties,[8] placing the worker in unlivable housing quarters,[9] refusing to process grievances filed by the employee[10] and threats of dismissal or physical injury.[11]

The two cases involved in this petition illustrate the breadth of the exception which the Fifth Circuit has created to federal anti-retaliation protections. In *Hernandez* the Fifth Circuit did not question the jury's finding that the retaliatory counterclaim had caused $20,000 in damage. But such a counterclaim was held to be a permissible method of retaliation because it was "dissimilar" to actions like demotions and dismissal. All of the retaliatory practices that had previously been held to constitute ultimate employment actions, the court noted, involved actions against current workers. (App. 8a n.2). "A counterclaim filed after the employee has already been discharged in no way resembles . . . ultimate employment decisions." (App. 9a).

The petitioners in *Banks* alleged retaliatory discrimination in the hourly wages they were offered if they promoted into the Janitor position. That did not constitute an ultimate employment decision, the court of appeals reasoned, because it reduced their compensation in a job they were seeking, not in the Janitor I position they already held. "[T]he Board's implementation of the new

---

[8] *Foley v. University of Houston Syst.*, 324 F.3d 310, 313, 317 (5th Cir. 2003) (removal of plaintiff as chair of Education Division); *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 651, 658 (5th Cir. 2002) (stripping plaintiff of "many of" her responsibilities); *Thomas v. Texas Dept. of Criminal Justice*, 220 F.3d 389, 394 n.2 (5th Cir. 2000); *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999).

[9] *Thomas v. Texas Dept. of Criminal Justice*, 220 F.3d 389, 395 n.2 (5th Cir. 2000).

[10] *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997).

[11] *Mattern*, 104 F.3d at 705.

Janitor position . . . did not constitute an ultimate employment decision because it did not affect the Employees' job duties, compensation, or level of benefits *as Janitor I employees*." (App. 41a-42a) (Emphasis added).[12]

The Board's new reading requirement, particularly in combination with the requirement that the *Banks* petitioners risk dismissal to retake the test, had the undeniable effect of deterring virtually all of the petitioners from continuing to seek promotion to Janitor. But even if that was the very purpose of the allegedly retaliatory scheme, it was entirely lawful.

> [A] decision made by an employer that only limits an employee's opportunities for promotion . . . does not qualify as an adverse action under Title VII. . . . Even assuming that the Board told Employees they would lose their jobs if they accepted the probationary position but failed the retest, the Board's decision . . . was, at most, a mediate decision that *could lead* to an adverse employment decision for an applicant who failed that retest. Thus, the Board's decision . . . does not qualify as an ultimate employment decision. . . .

(App. 39a, 43a) (emphasis in original).

The Fifth Circuit's ultimate employment decision doctrine originated in *Dollis* and *Mattern*, both Title VII cases. The petitioners in both *Hernandez* and *Banks* asserted retaliation claims under section 704(a) of Title VII. The Fifth Circuit has since extended that limitation to claims under the Age Discrimination in Employment Act, and thus dismissed the ADEA retaliation claims in

---

[12] "Regardless of whether the conditions placed on the new Janitor position were unfavorable to employees seeking to be 'promoted' to it, the Board's implementation of this new position, with its new salary structure . . . did not constitute an ultimate employment decision under Title VII." (App. 40a).

Hernandez. (App. 6a n.1). The Fifth Circuit has also held that the doctrine applies to claims under section 1981,[13] and thus dismissed the section 1981 claim in *Hernandez*. In *Banks* the Fifth Circuit applied to section 1983 First Amendment claims a slightly modified version of this rule. Government workers retaliated against for activities protected by the First Amendment cannot obtain relief unless the retaliation either took the form of an ultimate employment decision or constituted "a reprimand, disciplinary action, or transfer 'equivalent to a demotion.'" (App. 48a).[14]

(2) The panel in *Hernandez* candidly recognized that the Fifth Circuit's "ultimate employment decision" rule is in conflict with the manner in which most circuits interpret federal anti-retaliation laws. The majority conceded that "'[o]ur court has analyzed the "adverse employment action" element [of a retaliation claim] in a stricter sense than some other circuits.'" (App. 7a) (*quoting Burger v. Central Apartment Mgmt.*, 168 F.3d 875, 878 (5th Cir. 1999)). The concurring judge similarly recognized:

> A majority of the federal circuits that have considered the question have held that the protection afforded by the anti-retaliation provision [of Title VII] extends to adverse employment actions that, while substantial, fall short of ultimate employment decisions. . . . Indeed, the only other circuit that purports to follow the "ultimate employment decision" rule, the Eighth Circuit, in practice applies something broader.

(App. 10a-11a).

---

[13] *Foley v. University of Houston System*, 324 F.3d 310, 316-17 and n.2 (5th Cir. 2003); *Felton v. Polles*, 315 F.3d 470, 486 (5th Cir. 2002).

[14] The Fifth Circuit has also applied the doctrine to retaliation claims under the Family and Medical Leave Act. *Hunt v. Rapides Healthcare Syst.*, 277 F.3d 757, 768-69 (5th Cir. 2001).

The Fifth Circuit had earlier acknowledged the existence of that conflict.

> Our court has analyzed [section 704(a)] in a stricter sense than some other circuits. . . . The Eleventh Circuit has recently discussed the circuit split surrounding the issue of whether Title VII's protection against retaliatory discrimination extends only to "ultimate employment decisions." . . . We are not alone, but we are in the minority.

Burger v. Central Apartment Mgmt., 168 F.3d 875, 878 and n.3 (5th Cir. 1999).

> The courts of appeals are split on this issue. The Fifth and the Eighth Circuit have adopted the "ultimate employment decision" standard. . . . Every other circuit to address the issue has held that employment decisions falling short of ultimate employment decisions may suffice.

Zaffuto v. City of Hammond, 308 F.3d 485, 492 (5th Cir. 2002).

The Ninth Circuit has correctly described the complex nature of this inter-circuit conflict.

> The circuits are currently split as to what constitutes an adverse employment action [prohibited by section 704(a)]. . . . [C]ircuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits. . . .
>
> [T]he First, Seventh, Tenth, Eleventh and D.C. Circuits . . . all take an expansive view of the type of actions that can be considered adverse employment actions. . . . The Second and Third Circuits hold an intermediate position within the circuit split. They have held that an adverse action is something that materially

> affects the terms and conditions of employment. . . . The Fifth and Eighth Circuits, adopting the most restrictive test, hold that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions.

Ray v. Henderson, 217 F.3d 1234, 1241-42 (9th Cir. 2000).[15] In *Ray* the Ninth Circuit adopted yet a fourth distinct position, urged by the EEOC, holding that section 704(a) forbids any practice "reasonably likely to deter employees from engaging in protected activity." 217 F.3d at 1243.

The Eleventh Circuit has also recognized the disagreement among the courts of appeals.

> There is a circuit split on this issue. While the Eighth Circuit has sided with the Fifth Circuit, . . . the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. . . . We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.

---

[15] See *Vasquez v. County of Los Angeles*, 307 F.3d 884 (9th Cir. 2002) (footnotes omitted):

> We have taken a broad view of adverse employment actions. There are a wide array of disadvantageous changes in the workplace that constitute adverse actions, including some lateral transfers. As noted in *Ray v. Henderson*, we are in accord with the First, Seventh, Tenth, Eleventh and D.C. Circuits, which also take an expansive view of adverse employment actions, in holding that an action can be adverse even if it is not an ultimate employment decision like termination. . . .

Wideman v. Wal-Mart Stores, 141 F.3d 1453, 1456 (11th Cir. 1998). The Eleventh Circuit reiterated in four subsequent cases its rejection of the ultimate employment doctrine.[16]

The Fourth Circuit has also acknowledged the problem, noting that even the position of the Eighth Circuit is not as extreme as that of the Fifth. The Fourth Circuit expressly rejected the rule in the Fifth Circuit.

> [T]he majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases. . . . [W]hile the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. . . . [I]n *Mattern* . . . the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3. . . . But "ultimate employment decision" is not the standard in this circuit. . . . [W]e have expressly rejected distinctions, like those drawn by *Mattern*. . . .

Von Gunten v. Maryland, 243 F.3d 858, 864-65 (4th Cir. 2001).

---

[16] *Shannon v. Bellsouth Telecommunications*, 292 F.3d 712, 716 (11th Cir. 2002) ("[a]dverse employment action does not refer only to ultimate employment decisions"); *Bass v. Board of County Comm'rs*, 256 F.3d 1095, 1118 (11th Cir. 2001); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000); *Graham v. State Farm Mutual Ins.*, 193 F.3d 1274, 1283 (11th Cir. 1999) ("The Eleventh Circuit recently joined the First, Ninth, and Tenth Circuits in holding that Title VII's protection . . . extends to adverse actions which fall short of ultimate employment decisions. . . . Thus, actions such as undeserved negative job evaluations, demotions, disadvantageous transfer, or toleration of harassment are actionable under the retaliation clause.").

In addition to the Fourth, Ninth and Eleventh Circuits, which expressly noted the existence of this conflict in rejecting the Fifth Circuit's ultimate employment doctrine, five other circuits have held that section 703(a) forbids retaliatory practices that are deemed lawful by the Fifth Circuit. In *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994), the First Circuit held that section 703(a) forbids not only ultimate employment actions, but also "actions such as . . . , disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees," all practices which are legal forms of retaliation in the Fifth Circuit.[17] The First Circuit has repeatedly held that a significant reduction in work responsibilities can constitute actionable retaliation.[18] In *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994), the First Circuit rejected a contention that the anti-retaliation provision of the ADEA (also involved in *Hernandez*) was limited to discharge, demotion or failure to promote. "[M]any things, such as constant rudeness, . . . could have an adverse effect." That court of appeals has found an asserted retaliatory act insufficient only where the "[p]laintiff ha[d] not alleged that he was damaged in any way by the [employer's] action." *Connell v. Bank of Boston*, 924 F.2d 1169, 1179 (1st Cir. 1991).

The Second Circuit requires only that the retaliatory act cause "a materially adverse change" in the plaintiff's circumstances. *Torres v. Pisano*, 116 F.3d 625, 640 (2d

---

[17] That same list of unlawful retaliatory practices short of ultimate employment decisions is set out in *Hernandez-Torres v. Intercontinental Trading*, 158 F.3d 43, 47 (1st Cir. 1998), *Gu v. Boston Police Dept.*, 312 F.3d 6, 14 (1st Cir. 2002), *Marrero v. Goya of Puerto Rico*, 304 F.3d 7, 23 (1st Cir. 2002), and *White v. New Hampshire Dept. of Corrections*, 221 F.3d 254, 262 (1st Cir. 2000).

[18] *Gu v. Boston Police Dept.*, 312 F.3d 6, 14 (1st Cir. 2002).

Cir.), *cert. denied*, 522 U.S. 997 (1997).[19] It agrees with the majority of circuits that the retaliatory practices barred by section 703(a) are

> not confined "simply to instances of discrimination in pecuniary emoluments"; diminution of duties, motivated by discriminatory animus, may also constitute an adverse employment action.

Garber v, New York City Police Dept., 1998 WL 514222 *2 (2d Cir., June 12, 1998). "We recognize that, as in retaliation cases brought under Title VII, the ADEA does not define adverse employment action solely in terms of job termination or reduced wages, and that less flagrant reprisals by employers may indeed be adverse. . . . [An] employer can make [a] job undesirable without affecting money or benefits." *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). The Second Circuit has joined with the Seventh and Tenth circuits in holding that retaliatory harassment is forbidden, expressly rejecting the Fifth Circuit's holding to the contrary in *Mattern*.[20]

---

[19] The Sixth Circuit utilizes the same standard. *White v. Burlington Northern & Santa Fe Ry.*, 310 F.3d 443, 450-51 (6th Cir. 2002); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999).

[20] *Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 445-46 (2d Cir. 1999):

> Courts disagree about whether an employee suffers 'adverse employment action' for the purposes of a retaliation claim when, as Richardson alleges, her employer allows her co-workers to harass her because she engaged in protected activity. *Compare Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) . . . , *and Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996), . . . *with* . . . *Mattern v. Eastman Kodak Co.*, . . . We adopt the view that unchecked retaliatory co-worker harassment, if sufficiently severe, may . . . satisfy the [requirements for a] retaliation *prima facie* case.

The Second Circuit has also held that a retaliation claim can be based on a showing that a plaintiff's "job duties and responsibilities

(Continued on following page)

The Seventh Circuit has repeatedly held that a retaliatory act is actionable so long as it causes significant injury.

> There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action. . . . No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment: actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of preciously available support services . . . or cutting off challenging assignments. . . . The law deliberately does not take a "laundry list" approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.

Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).[21] The Fifth Circuit, of course, has adopted just such a laundry list approach.

---

were downgraded in retaliation, and his position was reduced to largely clerical tasks," even though no loss of income was involved. *Preda v. Nissho Iwai American Corp.*, 128 F.3d 789, 791 (2d Cir. 1997).

[21] *See Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000) ("since the very purpose of the anti-retaliation provision is to prevent Title VII claims from being deterred . . . efforts to deter or prevent the filing of a claim can be actionable even if they take forms other than firing or demotion or other job action . . . provided they are severe enough to amount to adverse employment actions."); *Smart v. Ball State Univ.*, 89 F.3d 437, 440 (7th Cir. 1996) ("[a]dverse employment action has been defined quite broadly in this circuit."); *Collins v. State of Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987) ("several courts have found an adverse job action, for purposes of discrimination or retaliation, in a lateral transfer even where the transfer did not result in a reduction of pay or benefits. Title VII does not limit adverse job action to strictly monetary considerations.") (footnotes omitted).

The Tenth Circuit has also refused to limit the scope of the anti-retaliation provisions to certain types of practices. "In recognition of the remedial nature of Title VII, the law in this circuit liberally defines adverse employment action." *Jeffries v. State of Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998). "[W]e have liberally interpreted the phrase 'adverse employment action.'" *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). "It would be illogical to define a section 704(a) employee liberally to include former employees and to simultaneously define an adverse employment action narrowly by limiting it to those formal practices linked to an existing employee/employer relationship." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996). The Tenth Circuit has held that retaliatory co-worker harassment is actionable under section 704(a), citing similar holdings in the First and Seventh Circuits, and rejecting holdings to the contrary in the Fourth, Fifth and Eighth Circuits. *Gunnell*, 152 F.3d at 1264-65 (10th Cir. 1998).

Finally, the District of Columbia Circuit has held that the ADEA "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (D.C. Cir. 1991). As under Title VII, the plaintiff need only show that "the employer . . . engaged in conduct having an adverse impact on the plaintiff." *Id.*

As the Ninth Circuit observed in *Ray*, the inter-circuit conflict is a complicated one. The Eighth Circuit has on two occasions invoked the ultimate employment decision standard. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Manning v. Metropolitan Life Ins.*, 127 F.3d 686, 692 (8th Cir. 1997). But those Eighth Circuit decisions also use much broader language. E.g., *Ledergerber*, 122 F.3d at 1144 ("materially significant disadvantage," "materially altered the terms or conditions");

Manning, 127 F.3d at 692 ("materially adverse employment action.") The Eighth Circuit has held actionable under section 704(a) a variety of practices that would not constitute ultimate employment decisions in the Fifth Circuit. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999) (change in job title, reduction in duties, interference with employee's ability to do her job); *Manning v. Metropolitan Life Ins.*, 127 F.3d at 692 (negative job references); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (reduction of job duties, lower performance evaluations, requirement of remedial training).

Among the circuits expressly rejecting the ultimate employment action rule, there are also clear differences. The Second,[22] Sixth[23] and Eleventh[24] Circuits require that the impact of an adverse action be "material." The Tenth Circuit, on the other hand, rejects that additional requirement.[25] In the Ninth Circuit, the touchstone for determining whether retaliation is actionable is whether that action might deter protected activities. The Seventh Circuit insists that that standard is too lax.[26]

---

[22] E.g., *Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 446 (2d Cir. 1999).

[23] E.g., *White v. Burlington Northern & Santa Fe Ry.*, 310 F.3d 443, 450 (6th Cir. 2002).

[24] E.g., *Bass v. Board of County Comm'rs*, 256 F.3d 1095, 1118 (11th Cir. 2001).

[25] *Jeffries v. State of Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) ("The Tenth Circuit has never recognized a 'materiality' requirement and we decline to do so here."); *Trujillo v. New Mexico Dept. of Corrections*, 1999 WL 194151 *3 (10th Cir., April 8, 1999) (same).

[26] *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1996).

II. FEDERAL AGENCIES IN BRIEFS FILED IN THE COURTS OF APPEALS ARE ADVOCATING CONFLICTING INTERPRETATIONS OF THE LAW

The inter-circuit conflict regarding the scope of section 704(a) of Title VII and section 4(d) of the ADEA is the result in part of a disagreement within the Executive Branch. The Department of Justice, as counsel for federal officials and agencies sued for retaliation, has repeatedly urged the appellate courts to adopt or apply the Fifth Circuit's stringent ultimate employment decision requirement.[27] The EEOC, on the other hand, has long disagreed with the Fifth Circuit's rule, and has repeatedly filed amicus briefs in other cases urging courts of appeals to reject that rule.[28] In every instance in which the EEOC has filed such a brief outside the Fifth Circuit, the court of appeals has sustained the EEOC's position.

The conflict between the legal position of the Civil Division and that of the EEOC is not a mere oversight. The differences in the positions advanced by the briefs of those agencies is the result of an express and candid disagreement between the two agencies involved. The Solicitor General has not taken action to end the inconsistency in the positions being advanced in the courts of appeals by these vying federal agencies.

In *Ray v. Henderson*, for example, the Ninth Circuit noted that "[t]he government [as counsel for the defendant Postal Service] urges us to . . . adopt the Fifth and Eighth Circuit rule that only 'ultimate employment actions' such as hiring, firing, promoting and demoting constitute actionable adverse employment actions." 217 F.3d at 1242.

---

[27] E.g., *Ray v. Henderson*, 217 F.3d 1234, 1242 (9th Cir. 2000); *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994); Appellee's Brief, Hassman v. Caldera, No. 00-1104 (4th Cir.), pp. 14-17.

[28] E.g., *Von Guten v. Maryland*, 243 F.3d 858, 861 (4th Cir. 2001); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 982 (10th Cir. 1996).

The Ninth Circuit declined to do so, instead accepting the EEOC's interpretation of section 704(a). "Because the EEOC standard is consistent with our prior case law and effectuates the language and purpose of Title VII, we adopt it." 217 F.3d at 1243. In *Arnold v. United States Dept. of the Interior*, 213 F.3d 193 (5th Cir. 2000), the Civil Division argued that the retaliation alleged in that case was lawful because "[t]his Court has held that a wide array of negative employment events do not satisfy [the ultimate employment decision] standard."[29] In *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1994), the Department of Justice unsuccessfully urged the First Circuit to limit the anti-retaliation provision of the ADEA to discharge, demotion, or failure to promote.

In *Von Gunten v. Maryland*, 243 F.3d 868 (4th Cir. 2001), on the other hand, the EEOC successfully urged the Fourth Circuit to overturn a district court decision that had utilized the ultimate employment action doctrine.

> [T]he district court erroneously held that § 704 prohibits only "ultimate employment decisions" – "hiring, granting leave, discharging, promoting and compensating." Section 704 contains no such limitation. . . . [C]ase law . . . confirms that conduct short of an "ultimate employment decision" is actionable under § 704.
>
> We recognize that two circuits have adopted an "ultimate employment decision" standard. . . . However, neither court attempts to explain how allowing employers to take retaliatory measures, short of an "ultimate employment decision," against employees who assert their Title VII rights would further the purposes of § 704. On the contrary, it would stifle employees' willingness to complain of discrimination.

---

[29] Brief for the Appellee, No. 99-10753 (5th Cir.), p. 30.

Brief of the EEOC as Amicus Curiae In Support of Plaintiff, No. 00-1058, pp. 24-28.

In *Wideman v. Wal-Mart Stores*, 141 F.3d 1453 (11th Cir. 1998), the Commission successfully opposed adoption of the Fifth Circuit's rule.

> The most natural reading of [section 704(a)] is that it prohibits any form of discrimination against an individual for filing a charge. . . . The term "ultimate employment decision" nowhere appears in Title VII. . . . An employer who can retaliate with impunity by using methods that fall short of an "ultimate employment decision" . . . will inevitably discourage employees from participating in Title VII proceedings or opposing unlawful practices.

Brief of the EEOC as Amicus Curiae, No. 97-2897, pp. 16-19.

The EEOC has unsuccessfully urged the Fifth Circuit to abandon its stringent requirement:

> The federal anti-discrimination laws prohibit retaliation for the filing of an EEOC charge even when the retaliation does not involve any form of employment action. This Court's law to the contrary is wrong. . . . [T]he ultimate employment decision doctrine finds no support in the statutes.

Brief of the EEOC as Amicus Curiae In Support of Roger Bunch's Petition for Initial Hearing En Banc, No. 99-11289 (5th Cir.), pp. 3, 7.

The EEOC Compliance Manual expressly rejects both the Fifth Circuit's "ultimate employment decision" doctrine and the requirement in the Second, Sixth and Eleventh Circuits that the retaliatory act cause a "material" harm. The EEOC instead endorses the Ninth Circuit's more liberal interpretation of the anti-retaliation provisions.

> Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. Others have construed the provisions more broadly, but

> have required that the action materially affect the terms, conditions, or privileges of employment.
>
> The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be challenged regardless of the level of harm. As the Ninth Circuit has stated, the degree of harm suffered by the individual "goes to the issue of damages, not liability."
>
> . . . .
>
> This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[m]aintain[ ] unfettered access to statutory remedial mechanisms." Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

EEOC Compliance Manual, ch. 8, pp. 13-15 (footnotes omitted).[30]

---

[30] http://www.eeoc.gov/docs/retal.html.

The EEOC has also objected to the requirement in the Sixth Circuit that the retaliatory action must be one which is "materially" adverse. In *White v. Burlington Northern & Santa Fe Ry. Co.*, 310 F.3d 443 (6th Cir. 2002), *reh. granted*, 321 F.3d 1203 (6th Cir. 2003), the Sixth Circuit concluded that the retaliatory practices in that case, though unquestionably harmful, did not meet the "materially" requirement. The Commission filed a brief urging rehearing en banc.

> There is no language in the anti-retaliation provision of Title VII limiting its protection only to retaliation in the form of "ultimate" or "materially adverse" employment action. . . . [U]nder the panel's interpretation of Title VII, an employer could openly use the threat of a retaliatory transfer or temporary suspension, for example, to discourage employees from filing a charge or opposing discriminatory conduct. Interpreting Title VII's anti-retaliation provision so as to *permit* forms of retaliation that could effectively deter individuals from engaging in what should be protected activity thus places the panel's decision at odds with the Supreme Court's *Robinson* [*v. Shell Oil Co.*, 519 U.S. 337 (1997)] decision.

Brief of the EEOC as Amicus Curiae In Support of Plaintiff-Appellee's Suggestion for Rehearing En Banc, Nos. 00-6780 and 01-5024, pp. 3-7 (emphasis in original).

Similarly, the Commission has maintained that the retaliatory action need not be an *employment* action at all.

> In defendant's view § 704(a) does not prohibit an employer from taking reprisals against employees who file Title VII charges as long as the retaliatory acts cannot be labeled as employment actions. This argument ignores the language of § 704(a) and, if accepted, would go a long way toward vitiating the protection Congress intended to afford to persons who assert claims under Title VII.

> Section 704(a) broadly prohibits any "discrimination" against a covered individual "because he has made a charge" under Title VII. This prohibition is not limited to any particular actions nor is it confined to any particular form of discrimination. . . .
>
> The harm caused by retaliatory acts directed at individuals who file charges of discrimination does not depend on the particular method of retaliation chosen by the employer.

Brief of the EEOC as Amicus Curiae, Berry v. Stevinson Chevrolet, Nos. 93-1031, 1055, 1072, 1127 and 1354 (10th Cir.), pp. 14-17.

The Justice Department's litigation position regarding these anti-retaliation provisions is at odds as well with the Secretary of Labor's interpretation of the anti-retaliation provision of the Energy Reorganization Act of 1974. 42 U.S.C. § 5851(a). That provision forbids retaliation against individuals for participating in proceedings under that Act or the Atomic Energy Act of 1954. In *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), the Secretary insisted that section 5851(a) protected a former employee engaged in litigation with his ex-employer, where the employer had insisted on a gag order as a condition of settlement. The Second Circuit sustained the Secretary's view that section 5851(a) applied to an employer's post-employment litigation tactics.

> CL & P argues that the challenged activity did not discriminate against [the worker] with respect to his terms of employment as required by the statutory language, but rather arose from [his] post-termination litigation. . . . This argument is specious. . . . As CL & P would have it, once an employment conflict degenerates to the point of formal litigation, the tactics employed by the litigants would be protected from the legal constraints imposed by the ERA. We disagree. . . .

> In this case, CL & P sought to impose . . . improper conditions on the final terms of its employment relationship with [the worker]. The fact that it did so under the cover of a litigation strategy is irrelevant. Therefore, we hold that the Secretary's interpretation is permissible. . . .

85 F.3d at 95-96.

III. THE DECISIONS BELOW ARE IN CONFLICT WITH THIS COURT'S DECISION IN *ROBINSON V. SHELL OIL CO.*, 519 U.S. 337 (1997)

The Fifth Circuit's professedly "strict" interpretation of section 704(a) and other anti-retaliation provisions is inconsistent with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *Robinson* held that the general language of such statutes should be construed in light of "a primary purpose of antiretaliation provisions: maintaining unfettered access to statutory remedial mechanisms." 519 U.S. at 848. That purpose is assuredly frustrated by the Fifth Circuit's ultimate employment decision doctrine, which the Department of Justice has correctly noted legalizes "a wide array of negative . . . actions." (See p. 22, supra).

The EEOC has repeatedly maintained in the courts of appeals that the "ultimate employment decision" is inconsistent with *Robinson*. In *Von Gunten v. State of Maryland*, the Commission insisted that "*Robinson* cannot be reconciled with [the ultimate employment decision doctrine] since post-employment retaliation against a former employee would rarely, if ever, involve 'hiring, granting leave, discharging, promoting or compensating.'" Brief of the EEOC as Amicus Curiae In Support of Plaintiff, No. 00-1058, pp. 24-28. In *Gustafson, Inc. v. Bunch*, 244 F.3d 154 (5th Cir. 2000), the Commission advanced the same objection. The EEOC's broader interpretation of the anti-retaliation provisions, it insisted,

> is the only one consistent with their fundamental purpose: to "maintain[] unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).
>
> A[] Supreme Court case, . . . issued after *Mattern*, confirms that this Court erred in restricting Title VII's anti-retaliation provision to "ultimate employment decisions." In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court held that Title VII protects former employees from retaliation. *See id.* at 346. Because an employer no longer has an employment relationship with a former employee, it is no longer in a position to make any "ultimate employment decisions" regarding that individual. Indeed, in *Robinson*, the alleged retaliation consisted of a negative employment reference. *See id.* at 337. A negative reference, standing alone is much like a negative performance evaluation. It is not, of itself, an employment action.

Brief of the EEOC as Amicus Curiae In Support of Roger Bunch's Petition for Initial Hearing En Banc, No. 99-11289 (5th Cir.), pp. 4, 9-10.[31]

Even the Sixth Circuit's somewhat less stringent standard, the Commission maintains, is in conflict with *Robinson*.

> The majority's holding that Title VII does not prohibit employers from retaliating against individuals as long as the form of retaliation falls short of "materially adverse" or "ultimate" employment actions conflicts with . . . the Supreme

---

[31] The Commission took the same position regarding *Robinson* in its amicus brief in *Wideman v. Wal-Mart Stores*. Brief of the EEOC as Amicus Curiae, No. 97-2897, pp. 17-20.

> Court's . . . interpretation of the anti-retaliation provision. . . .
>
> The [Sixth Circuit panel opinion in *White v. Burlington Northern & Santa Fe Ry. Co.*, 310 F.3d 443 (6th Cir. 2002)] . . . does not explain how its decision can be reconciled with the purpose of the anti-retaliation provision – namely, to "[m]aintain[ ] unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. . . . The panel does not discuss its ruling in light of the purpose of the anti-retaliation provision, and it is difficult to see how the panel's decision can be reconciled with that purpose, for its ruling permits an employer "to retaliate with impunity" in "an entire class of acts." *Robinson*, 519 U.S. at 346. . . .
>
> The panel's decision . . . also cannot be squared with the precise holding of the *Robinson* Court. In *Robinson*, the plaintiff sued his former employer, alleging that it had retaliated against him by giving a negative employment reference to a potential employer. There was no allegation that the former employer itself had made an ultimate employment decision. The Supreme Court nevertheless allowed the plaintiff's claim to proceed after holding that former employees may challenge retaliatory actions.

Brief of the EEOC as Amicus Curiae In Support of Plaintiff' Appellee's Suggestion for Rehearing En Banc, Nos. 00-6780 and 01-5024 (6th Cir.), pp. 3-7.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

TIMOTHY B. GARRIGAN
STUCKY, GARRIGAN & CASTETTER
2803 North Street
P.O. Box 631902
Nacogdoches, TX 75963-1902
(936) 560-6020

NANCY PICARD
ROBEIN, URANN & LURYE
2540 Severn Avenue
Suite 400
Metairie, LA 70002
(504) 885-9994

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

**Counsel of Record*

Revised February 28, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Summary Calendar
No. 01-41393

JUAN HERNANDEZ

Plaintiff-Appellee

v.

CRAWFORD BUILDING MATERIAL COMPANY, doing business as Crawford's Discount Carpet and Home and Floor Center

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas

February 21, 2003

Before KING, Chief Judge, and SMITH and DENNIS, Circuit Judges.

PER CURIAM:

Defendant-Appellant Crawford Building Material Company ("Crawford") appeals the final judgment entered by the District Court for the Eastern District of Texas ordering Crawford to pay Plaintiff-Appellee Juan Hernandez $20,000 in compensatory damages and $55,000 in punitive damages as a result of Hernandez's claim that Crawford initiated a retaliatory employment action in

violation of Title VII. Crawford attacks both the sufficiency of the evidence presented to the jury and the ability of an employee to base a Title VII retaliation claim on the employer's filing of a counterclaim against that employee after the employee has been discharged. We conclude that the district court erred in denying Crawford's motion for judgment as a matter of law on the question of whether the filing of a counterclaim could support an action for employment retaliation. We therefore reverse the district court and remand with instructions to dismiss the retaliation claim.

I. FACTS AND PROCEDURAL BACKGROUND

Hernandez, a Mexican immigrant, began working as a manual laborer at Crawford's lumber yard around 1975. At some point, management at Crawford became dissatisfied with Hernandez's performance; he was transferred to Crawford's carpet warehouse, where he received a pay raise concomitant with increased duties. Crawford continued to be unhappy with Hernandez, though, and on June 17, 1999, Crawford fired Hernandez after he miscut a roll of carpet and failed to report the mistake. At that time, Hernandez was sixty-one years old.

Hernandez filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and with the Texas Commission on Human Rights. When neither commission would provide him with the relief requested, he sought and secured a "right-to-sue" letter from the EEOC. On October 13, 2000, Hernandez filed suit against Crawford, alleging that his termination violated the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 1981, and Title VII.

At some point while Hernandez was pursuing this suit, someone told one of Crawford's owners that Hernandez had been stealing company property while he was employed at Crawford. The witness, Manual Guerra, was a painter who had done business with Crawford. He reported seeing building materials belonging to Crawford stacked behind Hernandez's house; he also reported that Hernandez was selling that property. Hernandez allegedly told Guerra that Crawford paid him with building materials.

Crawford answered Hernandez's complaint on November 3, 2000. In that answer, Crawford both denied the allegations of discriminatory discharge and raised a counterclaim for theft against Hernandez. In his answer to Crawford's counterclaim, Hernandez denied having ever stolen building materials from Crawford. Then, on May 21, 2001, Hernandez supplemented his original complaint to allege that Crawford's counterclaim amounted to a retaliatory employment action in violation of Title VII, the ADEA, and § 1981.

Hernandez moved for summary judgment on the counterclaim. The district court granted that motion, finding that Crawford could not prove specifically, or even generally, what was stolen or that Hernandez stole it. Most of the allegations of theft concerned items that had gone missing six or seven years earlier; at that time, Crawford had not investigated the problem. As a result, Crawford now simply lacked sufficient evidence to demonstrate to a jury that Hernandez had stolen Crawford's property.

At trial, the jury instruction covering Hernandez's retaliation claim included the following statements:

> The Plaintiff also brings causes of action for retaliation, in violation of Title VII, the ADEA, and § 1981. These laws prohibit an employer from retaliating against a former employee for filing a discrimination lawsuit. Here, Plaintiff Hernandez contends that Defendant Crawfords made allegations and the claim for theft to retaliate against Plaintiff for having brought this lawsuit and pursuing his claims of discrimination against this Defendant.
>
> To prevail on his retaliation claim, Plaintiff Hernandez must show by a preponderance of evidence his good faith opposition to discrimination and bringing this lawsuit was a substantial or motivating factor for a decision by Defendant Crawfords to make a theft allegation and counterclaim.

The jury found, in two special interrogatories, that Crawford had not discharged Hernandez because of his age or because of his Mexican heritage. However, the jury did find that Crawford's filing of the counterclaim constituted a retaliatory employment action. The jury awarded $20,000 in compensatory damages (for Hernandez's claimed mental anguish and shame as a result of being branded a thief) and $55,000 in punitive damages.

Crawford filed motions for a new trial and for judgment as a matter of law. In his motion for a new trial, he argued that there was insufficient evidence to support the jury's findings: (1) that Crawford had no permissible basis for filing the theft counterclaim; (2) that Hernandez had suffered actual damages as a result of the counterclaim; and (3) that Crawford had acted in a manner sufficient to warrant an award of punitive damages. In his motion for judgment as a matter of law, Crawford argued that the

filing of a counterclaim was not the kind of "ultimate employment decision" upon which a claim of retaliation may be based and, alternatively, that Hernandez had not proven that Crawford had a retaliatory motive in filing the counterclaim.

The district court denied both motions. The court found that Hernandez had presented sufficient evidence to support the jury's findings on the retaliation, causation, and damages questions. As for the question of whether the filing of a counterclaim could support a retaliation claim, the district court found that, by failing to object to the jury charge on the law of retaliation, Crawford had not preserved the issue for later challenge. As a result, the district court reviewed the question only for plain error; finding the issue debatable within the federal district courts in Texas, the district court concluded that no plain error had occurred.

Crawford timely appealed, raising two general classes of appealable issues. First, Crawford reargues that the filing of a counterclaim is not an "ultimate employment decision" sufficient to support a claim of employer retaliation. Second, Crawford asserts that there was insufficient evidence to support the jury's findings that: (1) Crawford had a retaliatory motive in filing the counterclaim; (2) the filing of the counterclaim caused any injury to Hernandez; (3) Hernandez was entitled to damages based on his mental anguish; (4) in the absence of actual damages, punitive damages were proper; and (5) Crawford's conduct was sufficiently egregious to support an award of punitive damages.

II. FILING A COUNTERCLAIM AS AN "ULTIMATE EMPLOYMENT DECISION" FOR PURPOSES OF TITLE VII RETALIATION CLAIMS

Crawford contends that the jury impermissibly based its verdict on a finding that the filing of a counterclaim constituted a retaliatory action. Crawford argues that an employer's filing of a counterclaim cannot constitute the "ultimate employment decision" necessary to support a finding of retaliatory employment action under Title VII and the ADEA in the Fifth Circuit.[1]

The district court denied this ground, in part because Crawford had failed to object to the jury charge on this issue. Because Crawford failed to preserve the issue, it is reviewed only for plain error. *Hartsell v. Dr. Pepper Bottling Co.*, 207 F.3d 269, 272 (5th Cir. 2000). To overturn a verdict for plain error in the jury instructions, we must find that the instructions made an obviously incorrect statement of law that was "probably responsible for an incorrect verdict, leading to substantial injustice." *Tompkins v. Cyr*, 202 F.3d 770, 784 (5th Cir. 2000).

Our precedents create a three-part test that a plaintiff must satisfy in order to prove a retaliation claim: "(1) the employee has engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment

---

[1] This court has held that analysis of retaliation claims is the same for ADEA claims as it is for Title VII claims. *Sherrod v. Amer. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Therefore, for purposes of this discussion, we will discuss only Hernandez's Title VII claim.

action." *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999) (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)). "Our court has analyzed the 'adverse employment action' element in a stricter sense than some other circuits." *Id.* at 878. In the Fifth Circuit, only an "ultimate employment decision" by an employer can form the basis for liability for retaliation under Title VII. *Mattern*, 104 F.3d at 705.

We have said that typical examples of ultimate employment decisions that can support a claim of retaliation include "hiring, granting leave, discharging, promoting, and compensating." *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1997). This understanding is grounded in the statutory language of Title VII. While retaliation cases are specifically covered by Section 2000e-3(a), we have looked to Section 2000e-2(a)(1), which makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," to determine which employment decisions can support a retaliation cause of action. In *Mattern*, we concluded that the kinds of "ultimate employment decisions" that will support a finding of retaliatory conduct must be similar to the kinds of conduct described in Section 2000e-2(a)(1). *Mattern*, 104 F.3d at 709; *id.* at 707 ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.") (quoting *Dollis*, 77 F.3d at 781-82). A review of our prior Title VII jurisprudence confirms

that we have consistently refused to recognize retaliation claims that are dissimilar to the prohibited activities of § 2000e-2(a)(1).[2]

---

[2] Activities meeting the standard of "ultimate employment decisions" include: *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 658 (5th Cir. 2002) (demotion); *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 194 (5th Cir. 2001) (denial of pay increase); *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2000) (discontinuation of employee's stipend, denial of request for paid leave, denial of request to extend unpaid leave, and termination); *Evans v. City of Houston*, 246 F.3d 344, 353 (5th Cir. 2001) (demotion); *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 394 (5th Cir. 2000) (failure to promote employee); *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 402 (5th Cir. 2000) (denial of pay raise); *Vadie v. Miss. State Univ.*, 218 F.3d 365, 374 (5th Cir. 2000) (refusal to consider employee for another position after closing employee's department); *Shackelford v. Deloitte & Touche*, 190 F.3d 398, 407 (5th Cir. 1999) (termination); *Sharp v. City of Houston*, 164 F.3d 923, 933 n.21 (5th Cir. 1999) (constructive demotion).

Activities which are not "ultimate employment decisions" include: *Green*, 284 F.3d at 657-58 (changing locks, restructuring office procedures, clarifying job duties, and reprimands); *Mota*, 261 F.2d at 521 (removal of employee's name from letterhead, ostracism by coworkers, and loss of some job duties); *Thomas*, 220 F.3d at 389 n.2 (assignment to less desirable shift and formal discipline); *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000) (removal from duties on particular account, timing of short breaks during the day, and failure to receive $2.89 allegedly owed for unplanned overtime); *Watts v. Kroger Co.*, 170 F.3d 505, 511-12 (5th Cir. 1999) (change of work schedule and request that employee perform new job tasks); *Burger*, 168 F.3d at 879 (denial of transfer request to an identical position at a different job site); *Webb v. Cardiothoracic Surgery Assocs. of N. Tex.*, 139 F.3d 532, 540 (5th Cir. 1998) (rude treatment by employer); *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997) (monitoring of employee's conversations, criticism of work and conduct, and refusal to consider employee's input in business decisions); *Mattern*, 104 F.3d at 708 (threats of potential dismissal, verbal reprimands, and low evaluations that could lead to missed pay increases).

District courts in other circuits have held that the filing of a suit or counterclaim can support a lawsuit premised on a theory of retaliatory employment action. *See Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (finding retaliation where employer instituted criminal prosecution of former employee who filed claim with EEOC); *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980) (finding retaliation where employer filed defamation suit against employee based upon statements made by employee to EEOC). However, this circuit has taken a more skeptical view, remarking that "[i]t is not obvious that counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis." *Scrivener v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999).

While there are no reported decisions from this circuit dealing directly with this question,[3] we think it is clear that, given our strict interpretation of retaliation claims, an employer's filing of a counterclaim cannot support a retaliation claim in the Fifth Circuit. A counterclaim filed after the employee has already been discharged in no way resembles the ultimate employment decisions described in

[3] There are two unreported Texas district court cases that have considered this question as well; the courts reached different conclusions. *See Gustafson, Inc. v. Bunch*, 1999 WL 304560 (N.D. Tex. 1999) (filing of suit by employer after employee was discharged did not constitute an "ultimate employment decision"); *Shafer v. Dallas County Hosp. Dist.*, 1997 WL 667933 (N.D. Tex. 1997) (filing of counterclaim supports Title VII retaliation action).

Section 2000e-2(a)(1). We find that the district court committed plain error in instructing the jury that Crawford's counterclaim could support a finding of retaliatory employment action. This instruction was an obvious misstatement of the law that led to substantial injustice for Crawford. This claim should not have gotten to the jury in the first place.[4]

IV. CONCLUSION

We REVERSE the district court's decision denying Crawford's motion for judgment as a matter of law and REMAND with instructions to dismiss Hernandez's retaliation claim. Costs shall be borne by Hernandez.

DENNIS, J., Circuit Judge, concurring:

I join fully in the per curiam opinion as a correct disposition in accord with our precedents. I write separately only to urge that the en banc court should reconsider our rule that "only an 'ultimate employment decision' by an employer can form the basis for liability for retaliation under Title VII." Opinion at 7 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997)). This rule is inimical to both the text and the purpose of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a). *See Mattern*, 104 F.3d at 710 (Dennis, J., dissenting). A majority of the federal circuits that have considered the

---

[4] Because we find Hernandez's retaliation claim uncognizable under Fifth Circuit law, we do not need to discuss his claims that the evidence presented at trial was insufficient to support the jury's verdict.

question have held that the protection afforded by the anti-retaliation provision extends to adverse employment actions that, while substantial, fall short of ultimate employment decisions. *See Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). Indeed, the only other circuit that purports to follow the "ultimate employment decision" rule, the Eighth Circuit, in practice applies something broader. *See e.g., Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (defining ultimate employment decision to include a "tangible change in duties or working conditions that constituted a material employment disadvantage").

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

JUAN HERNANDEZ,	§	
Plaintiff	§	
	§	
v.	§	Civil Action No. 9:00cv252
CRAWFORD BUILDING MATERIAL COMPANY,	§	
	§	
Defendants	§	

ORDER

Before the Court are Defendant's Motion for New Trial (Doc #41), Defendant's Motion for Judgment as a Matter of Law (Doc. #42), Memoranda in Support (Docs. #43 and #44), and Plaintiff's Responses (Docs. #46 and #47). This case was tried to a jury on September 17, 2001 through September 20, 2000 [sic]. The jury returned a verdict for Plaintiff on his claim that Defendant retaliated against him by claiming he committed theft. The jury subsequently awarded Plaintiff compensatory and punitive damages in the amount of $20,000 and $55,000, respectively. The Court entered a Final Judgment in accordance with the jury's findings on October 5, 2001. Defendant claims that the evidence does not support the jury findings in this case: (1) on the issue of retaliation; (2) actual damages resulting from the alleged retaliation by Defendant; and (3) punitive damages as found by the jury. Based on the parties' filings and the applicable law, the Court rules as follows.

I. Motion for Judgment as a Matter of Law

A. Sufficiency of the evidence

Rule 50(a) allows the court to take a case away from the jury by entering judgment as a matter of law against a party if there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on a particular issue. FED. R. CIV. P. 50(a). Title VII makes it unlawful for an employer to retaliate against an employee because [that employee] has opposed any practice made an unlawful employment practice by this subchapter. 42 U.S.C. § 2000e-3(a). To prevail on a Title VII retaliation claim, a plaintiff must successfully prove that: (1) the employee has engaged in activity protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal connection exists between that protected activity and the retaliatory action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997). Former employees may bring suit against former employers for post-employment actions allegedly taken in retaliation for seeking lawful vindication of their civil rights. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 849, 136 L.Ed.2d 808 (1997). The Fifth Circuit holds that the *McDonnell Douglas* burden-shifting framework applies in Title VII retaliation cases. *See Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir. 2001). As the Supreme Court explained in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), a plaintiff must present "sufficient evidence" for a jury to reasonably conclude that the employer's justification is unworthy of credence and is a pretext for discrimination or retaliation. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902-03 (5th Cir. 2000).

Plaintiff had the burden of proving that the retaliatory counterclaim would not have been filed "but for" the pursuit of his discrimination claims in court. *Seaman v. CSPH Inc.*, 179 F.3d 297 (5th Cir. 1999).[1] A retaliatory act's proximity in time to, protected activity can lead to an inference that a causal connection exists. *Evans v. City of Houston*, 246 F.3d 344, 345 (5th Cir. 2001); *Shirley v. Chrysler First. Inc.*, 970 F.2d 39 (5th Cir. 1992). Plaintiff established that he was terminated on June 17, 1999, that he filed a charge with the Texas Commission on Human Rights on or about September 10, 1999, and that he

---

[1] Defendant maintains that a counterclaim does not constitute an adverse employment action as required for a claim of retaliation in the Fifth Circuit. However, the Court notes that Defendant, states that the jury was properly charged. The Court instructed the jury that; "To prevail on his retaliation claim, Plaintiff Hernandez must show by a preponderance of the evidence his good faith opposition to discrimination and bringing this lawsuit was a substantial or motivating factor for a decision by Defendant Crawford's to make a theft allegation and counterclaim." Defendant failed to object to the charge at the time and asserts it now for the first time. Since Defendant failed to preserve the issue, the Court need only review it for plain error. *See Hartsell v. Dr. Pepper Bottling Co.*, 207 F.3d 269, 272 (5th Cir. 2000). Citing *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999), Defendant looks to the court's language that it is not obvious to the court that counterclaims filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. However, while not finding the counterclaim in that case constituted retaliation, the court did not close the door that a counterclaim could violate Title VII. The only reason the counterclaim in Scrivner was not retaliation, according to the court, was because it was filed, not by the employer, but by an employee in his individual capacity, so that his conduct could not attributable [sic] to the employer. Here, Crawfords, the employer, did file the counterclaim, an important distinction. *See also Shafer v. Dallas Co. Hosp. Dist.*, 1997 U.S. Dist. LEXIS 23451 (N.D. Tex. Oct. 22, 1997), (finding it "well-established" that filing a retaliatory lawsuit or counterclaim may be actionable under TITLE VII). The Court finds no plain error occurred.

received his right to sue letter from the EEOC on or about July 21, 2000. The parties stipulated that on or about August 2, 2001 [sic], Plaintiff's attorney wrote to Defendant and advised them that Plaintiff Hernandez intended to file a lawsuit. Defendant claims that the jury could not possibly have found a causal connection between the protected activity and the filing of the counterclaim because the latter was not filed until November 3, 2000, over a year after Plaintiff made his charge of illegal employment discrimination. However, the statement by Manuel Guerra, relied on by Defendant as the basis for its counterclaim, was made August 2, 2000, within two weeks after Plaintiff's receipt of his right to sue letter and during an investigation made by Defendant of the incident in light of the noticed impending lawsuit. Plaintiff filed his complaint on October 13, 2000, and a little over a month later, Defendant filed the counterclaim. Plaintiff presented sufficient evidence that a reasonable juror could infer that Defendant's filing a counterclaim of theft against him was causally connected and in retaliation for Plaintiff's protected activities.

As the burden then shifted to Defendant to establish a nondiscriminatory reason for filing the counterclaim, Crawford asserted that it inadvertently discovered information regarding the alleged theft during the course of the litigation. At this juncture, Defendant insinuates that the jury's review of the evidence at trial became a question of credibility of the witnesses, particularly Guerra's testimony relating to his statement, and argues that the jury is not authorized to draw conclusions in the absence of any evidence. While it is well settled that "disbelief of a witness's testimony is not sufficient to carry a plaintiff's burden," *Travelhost. Inc. v. Blandford*, 68 F.3d 958, 965

(5th Cir. 1995), the Court finds Plaintiff presented enough evidence that the jury could infer discriminatory pretext in filing the counterclaim. Other Crawford employees, including Sam Medley and Sam Roberts, also testified that they had "suspected" Plaintiff of stealing long before they had the "proof' supplied by the statement of Manuel Guerra, yet further testified that they did not act on their earlier suspicions by notifying the police or even confronting the Plaintiff. The jury could reasonably infer from their statements that Defendant treated their suspicions as a nonissue until Plaintiff's filing of the lawsuit. The owner, Joan Williams, testified that they would not have brought the counterclaim had Plaintiff Hernandez not brought his lawsuit, and continued that she had in fact experienced a 25-year history of honesty and trust with Plaintiff. Moreover, even Manuel Guerra testified on cross-examination that he did not have any reason to believe any of the materials in the possession of Plaintiff were stolen. The Court finds that Plaintiff presented sufficient evidence that would allow the jury to reasonably conclude that Defendant's proffered reason was false and a pretext to retaliate against Hernandez. Accordingly, the evidence supports a finding that "but for" Hernandez's protected activities, Defendant would not have filed a counterclaim against him, and the findings of the jury stand.

B. Actual Damages

Defendant further challenges the award of actual damages. Referring to the testimony regarding Plaintiff's sleeplessness, anxiety and worry following his termination, Defendant points out that none of the evidence relating to Plaintiff's mental anguish over his termination is relevant to the retaliation claim. While mental, anguish

requires a "high degree" of mental pain and distress "more than mere worry, anxiety, vexation, embarrassment, or anger," [] recent Fifth Circuit cases have upheld a Title VII retaliation award, in the very amount awarded to Plaintiff, for mental anguish where the testimony concerned "stress, sleeplessness, betrayal, and shame." *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458 (5th Cir. 2001), *cert denied, Oden v. Oktibbeha County, Mississippi*, 2001 WL 744067 (U.S. Oct. 09, 2001). *See also Giles v. General Electric Co.*, 245 F.3d 474, 488 (5th Cir. 2001) (finding that testimony of a plaintiff alone may be sufficient to support an award of mental damages for sleeplessness, anxiety, stress, lost prestige, humiliation, apparent despondence, depression, down, and discouraged). Likewise, though Defendant minimizes it, Hernandez and his daughter both presented similar evidence regarding the effects of the filing of the counterclaim; namely, Hernandez's continued worry, sleeplessness, changed eating habits, depression and shame that continued until, and was evidenced during, his testimony at trial, and his worry of what effect the theft allegation might have on any future employment. Like *Oden* and *Giles*, the Court concludes that Plaintiff's evidence supports the award for mental anguish resulting from the filing of Defendant's retaliatory counterclaim.

C. Punitive Damages

Defendant further challenges the award of punitive damages. While Defendant concedes that the jury's verdict on punitive damages is not excessive in a numerical sense or in proportion to the amount of actual damages found, it claims that no punitive damages can be awarded in the absence of actual damages. The Court having found that

Plaintiff proved compensable mental anguish sufficient to recover actual damages, Defendant next urges that there is insufficient evidence upon which the jury could have relied to justify an award of punitive damages.

Defendant cites *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1996), a Texas case, for the proposition that punitive damages are justified only when there is evidence of "malicious, intentional, fraudulent, or grossly negligent conduct." Id. at 18. However, as Defendant notes, *Moriel* is opposite in that it was predicated on a finding of gross negligence rather than intentional conduct. Here, the jury was charged, and Defendant does not contest the jury charge, that the jury was permitted to award punitive damages if it found that Crawfords acted with "malice or willfulness or with callous and reckless indifference to the rights of others." (Emphasis added). Title VII provides for the imposition of punitive damages in intentional discrimination cases is [sic] an employer acts with malice or reckless indifference to an employee's protected right. *Williams v. Treader Publishing Co.*, 218 F.3d 481, 487 (5th Cir. 2000). Moreover, the Supreme Court and Fifth Circuit have rejected the theory that a level of egregiousness if [sic] necessary in awarding punitive damages under Title VII. *See Kolstad v. American Dental Assoc.*, 527 U.S. 526, 119 S. Ct. 2118 (1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 281-82 (5th Cir. 1999). Plaintiff presented evidence showing the counterclaim was filed in unlawful retaliation for the exercise of his statutory rights. The jury found the filing of the counterclaim to be willful and intentionally discriminatory, sufficient in this case to support the award of punitive damages.

II. Motion for New Trial

Pursuant to Rule 59, Defendant moves the Court for a new trial for the same arguments made in its Motion for Judgment as a Matter of Law. See FED. R. CIV. P. 59(a). Under Rule 59, a district court enjoys considerable discretion in granting or denying a motion for new trial. *Lavespere v. Niagara Mach. & Tool Works. Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). For the reasons set forth above, the Court finds Defendant's arguments to be unpersuasive.

III. Conclusion

The Court finds that Plaintiff presented sufficient evidence that would allow the jury to reasonably conclude that Defendant unlawfully retaliated against Plaintiff. In addition, the Court finds Plaintiff presented sufficient evidence of the effects of the unlawful retaliation to reasonably support a jury award of actual damages in his favor. Further, the Court finds that the Plaintiff proved that the retaliation in the filing of the counterclaim was willful and intentional sufficient to justify the jury's award of punitive damages. Accordingly, Defendant's Motion for Judgment on the Pleadings is hereby DENIED. Defendant's Motion for New Trial is likewise DENIED.

It is so ORDERED.

SIGNED this 27th day of October, 2001.

John Hannah, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

JUAN HERNANDEZ,	§	
Plaintiff	§	
	§	
v.	§	CIVIL NO. 9:00-cv-252
CRAWFORD BUILDING MATERIAL COMPANY,	§	
	§	
Defendant	§	

ORDER

Before the Court are Plaintiff/Counter-Defendant Juan Hernandez' Motion for Partial Summary Judgment (Doc. #19), Defendant/Counter-Plaintiff's Response to Plaintiff/Counter-Defendant Juan Hernandez's Motion for Partial Summary Judgment (Doc. #20), Affidavit (Doc. #21), and Memorandum of Points and Authorities in Support (Doc. #22), and Plaintiff/Counter-Defendant's Reply (Doc. #23). Based on the parties' filings and the applicable law, the Court rules as follows.

I. Background

Juan Hernandez ("Hernandez"), began working for Crawford Building Materials Company ("Crawfords"), in 1975. His principle job was in the lumberyard, where he loaded and unloaded trucks, stacked wood, and performed other various jobs. During this time, Hernandez not only worked at Crawfords' place of business, but also worked on company time at the home and ranch of its owners, performing general maintenance work there. In the almost 25

years that Hernandez worked for Crawfords, he made little over minimum wage and supplemented his income with overtime work.

In 1998, Crawfords transferred Hernandez to the carpet warehouse, where he was in charge of carpet cutting and security. Hernandez claims that employees of Crawfords had openly discussed that Plaintiff was "too old" to do the heavy work required in the lumberyard. Crawfords alleges that Hernandez's work was increasingly unsatisfactory, and when Hernandez miscut a carpet square, Crawfords fired him.

Hernandez filed suit against Crawfords, alleging age as well as national origin discrimination, as Plaintiff is an Hispanic born in Mexico.[1] Crawfords denies any discriminatory actions and maintains that Hernandez was fired because his work became unsatisfactory over the years. Crawfords, upon information received during discovery, subsequently counterclaimed that Hernandez has taken building materials, tools, equipment, and supplies from it in violation of the Texas Penal Code and the Texas Theft Liability Act, an allegation that Hernandez denies and that forms the basis of this motion for summary judgment.

II. Summary Judgment Standard

A motion for summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any

---

[1] Hernandez later amended his complaint to add a claim of retaliation based on Crawfords' filing a counterclaim for theft.

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

The party moving for summary judgment, the movant, "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323-25, 106 S. Ct. at 2553). "The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues." *Rizzo v. Children's Worl* [sic] *Learning Ctrs., Inc.*, 84 F.3d 758, 762 (5th Cir. 1996) (citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992)). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075.

If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042,

1046-47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by argument, conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587, 106 S. Ct. 1348; *Ragas*, 136 F.3d at 458. However, factual controversies are to be resolved in favor of the opposing party "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Wallace*, 80 F.3d at 1047; *accord*, *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996). The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), *as modified*, 70 F.3d 26 (5th Cir. 1995). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports its claim. *Ragas*, 136 F.3d at 458. Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. *Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202 (1986); *Texas Instruments*, 100 F.3d at 1179. However, if the opposing party sets forth specific facts essential to their claims, a genuine issue of material fact

will then preclude summary judgment. *Coleman v. Houston Indep. School Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

III. Discussion

Crawfords alleges that Hernandez stole building materials, tools, equipment, and supplies in violation of section 31.03 of the Texas Penal Code. Under the statute, "(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property; (b) Appropriation of property is unlawful if (1) it is without the owner's consent." V.T.C.A., PENAL CODE § 31.03. If this statute is violated, a party harmed by its violation may seek recovery for resulting damages under the Texas Theft Liability Act. TEX. CIV. PRAC. & REM. CODE § 134.005(a)(1). The elements of offense of theft under section 31.03 are: (1) a person, (2) with intent to deprive owner of property, (3) unlawfully appropriates that property, (4) without effective consent of owner. *Washington v. State*, 909 S.W.2d 577 (Tex. App. 1995). In cases alleging the theft of property by an employee, as alleged in this case, theft may be established by showing that the employee did not have authority to dispose of or appropriate property in the manner alleged; thus theft is established by showing that the employee acted in some way inconsistent with his lawful authority. *Huff v. State*, 897 S.W.2d 829, 834 (Tex. App. 1995). Further, it has been held that evidence that an accused exercised control over property without consent of the owner, intending to deprive him of it, or evidence of accused's unexplained possession of recently stolen property, is sufficient to prove theft. *Jackson v. State*, 12 S.W.3d 836 (Tex. App. 2000). To prevail on its claims of theft, Crawfords will have to show that Hernandez, in fact, appropriated or exercised control

over Crawfords' recently stolen property without its consent.

Hernandez, as the party moving for summary judgment on the counterclaim, has the burden of showing there is no genuine issue as to any material fact, and ~~that~~ he is entitled to judgment as a matter of law. To demonstrate the absence of a genuine issue, Hernandez points to the deposition testimony of three witnesses that Crawfords produced in response to a notice of deposition: Joan Williams, Sam Medley, and Sam Roberts. Joan Williams, the primary owner of Crawfords, admits in her deposition testimony that Hernandez never stole from her personally, that she couldn't point to anything specific that was missing from Crawfords, nor did she have any reason to think Hernandez was stealing from Crawfords, that criminal charges were never sought against Hernandez, and that if Hernandez had not filed the discrimination lawsuit against Crawfords, she didn't believe Crawfords would have accused Hernandez of theft. "We would have just let it go." (Williams depo. p. 41, ln. 20). Hernandez also directs the Court to the deposition of Sam Medley, the manager and twenty-five percent owner of Crawfords, who also stated that he could not point to any specific thing that Hernandez stole from Crawfords, nor to anything in general. According to his testimony, if there was evidence that Hernandez was stealing, he would probably be aware of it. Last, Hernandez shows the Defendant's lack of evidence to prove him guilty of theft by way of deposition of Sam Roberts, manager of Crawfords' carpet store. According to Roberts, his weed eater, a pipe wrench, garden tools, and a shovel were missing from the warehouse at the time when Hernandez was supposed to be in charge of security. However, Roberts testified that, even

though he suspected him, he never had nor was he now accusing Hernandez of stealing those things and, moreover, would not approach Hernandez about it without any proof. Hernandez, by the deposition testimony of these three employees, shows that Crawfords has not been able to and cannot support the elements needed for its counterclaim of theft.

Even though the burden then shifts to Crawfords to show that specific facts exist over which there is a genuine issue for trial, Crawfords never mentions in its response the deposition testimony of Joan Williams or Sam Roberts. Crawfords does include an affidavit by Sam Medley that stated that he had no specific or "hard" evidence that any tools had been stolen or taken from the premises by Hernandez, that he had not made any investigation into any missing items, and had never made any accusations of theft to Hernandez. His affidavit only stated a belief that it was "probable" that Hernandez had committed theft.

In *Huff*, an employee was found to have unlawfully appropriated from her employer when it was found that she (1) wrote checks from her employers account and deposited them to her own account, and/or (2) paid bills with company checks or from money obtained from petty case [sic] without approval. *Huff*, 87 S.W.2d at 833. There, the company noticed that its property was missing, the company investigated, and the company traced the stolen property to its employee. *Id.*

Similarly, stolen property was identified, traced, and recovered in *Jackson*. *Jackson* is the reverse of the facts of this case in that Jackson had never been at the scene of the theft but was identified at three separate businesses as the possessor and seller of the alleged stolen materials.

Jackson, 12 S.W.3d at 840. There, a storage facility on company grounds was broken into and heavy aluminum molds weighing from 100 to 200 pounds were taken. *Id.* The company reported the theft to the police and faxed a reward poster to recycling facilities. *Id.* Within two days, the company identified the sold goods as their stolen molds and retrieved them. *Id.* at 838. The officer in charge of the investigation discovered who had sold the molds because the recycling facilities routinely make photocopies of the seller's identification when the metal being sold is valued over $25.00. *Id.* at 841. Though no witnesses could place Jackson, the seller in possession of the stolen goods, at the company, and the only evidence to convict him consisted of his recent and unexplained possession and sale of the items taken, the court concluded that a reasonable jury could have drawn the inference of Jackson's guilt. *Id.* at 841-42. The court held that if a defendant is in fact found in possession of recently stolen property, the fact finder may draw an inference that defendant is guilty of theft. *Id.*

Here, Crawford fails in its burden, because it cannot show first, specifically, or even generally, what was stolen. Next, Crawford cannot provide evidence that anything allegedly missing was taken by Hernandez as opposed to anyone else. Unlike *Huff* and *Jackson*, accusations were never made, an investigation was never pursued, and Crawfords has never introduced any proof that materials allegedly missing are in the possession of Hernandez, or that any building materials in the possession of Hernandez are items that belong to Crawfords.

The only disputable proof that Crawfords has in support of its claim is the statement and deposition of a customer, Manual Guerra, that he had bought a ladder and two shovels from Hernandez six or seven years earlier

and that at that time Hernandez had allegedly admitted to Guerra that the items came from Crawfords. In Guerra's deposition, he stated that he saw tools and building materials at Hernandez's house at the same time of his purchase. Though it had no "hard evidence," Crawfords submits the affidavit of Sam Medley, admitting it relied on this statement by Guerra as the basis for its claim of theft against Hernandez. Hernandez denies that he stole materials or sold them to Guerra, and Crawfords has not investigated nor identified the materials to know whether they were stolen or even belonged to Crawfords.

Moreover, even if Guerra's allegations seem to create a genuine issue for trial, his statement and deposition do not qualify as admissible evidence. Section 31.03(c) governs the admissibility of extraneous offenses in a theft case and requires a "recent" transaction to show the required intent of the offender. V.T.C.A., PENAL CODE § 31.03(c). "For purposes of Subsection (b): (1) evidence that the actor has previously participated in *recent* transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent. . . . " *Id.* (emphasis added). In *Ballard v. State*, 945 S.W.2d 902 (Tex. App. 1997), the court held that a six-year time span between the charged theft and a similar extraneous offense did not meet the "recent" transaction requirement for admission of evidence. *Id.* at 905. Similarly, there exists a six or seven year time span between the claimed theft here and the alleged incident involving Guerra. Crawfords makes the assumption, without providing the necessary proof, that the tools and materials allegedly seen by Guerra seven years earlier were tools and materials stolen from Crawfords – years before Hernandez transferred to the warehouse and Crawfords complained of

missing items, and years before the counterclaim of theft filed here.

IV. Conclusion

Crawfords has failed to produce evidence from which a rational fact finder could conclude that Hernandez in fact stole from Crawfords or was in possession of its recently stolen property. Consequently, Plaintiff/Counter-Defendant's Motion for Partial Summary Judgment is GRANTED in all respects.

IT IS SO ORDERED.

SIGNED this 9th day of August, 2001.

United States District Judge
John Hannah, Jr.

DOROTHY BANKS; ET AL, Plaintiffs, TINA BROOKS; SHIRLEY BROWN; ANNETTE J GRAY; MARY HOLMES; ANNIE JOHNSON; AMY LANE; ROSA MALVEAU; DOROTHY MCPIPE; ALMA NEWMAN; MAGGIE TUCKER; BERTHA TWINE; BERTHELLA WALLACE; EDNA WELCH; MARY WILLIAMS; NELLIE WILLIAMS, Plaintiffs-Appellants, versus EAST BATON ROUGE PARISH SCHOOL BOARD; INGRID KELLEY; WARREN L PRATT, JR; PRESS L ROBINSON, SR, DR; JACQUELINE MIMS; PATRICIA HAYNE-SMITH; NOEL HAMMATT; ROGER MOSER; DANIEL R HENDERSON; ELDON R LEDOUX; DALTON DEVALL; WILLIAM P BLACK; JAMES MANLEY, Defendants-Appellees.

No. 01-30090

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

320 F.3d 570; 2003 U.S. App. LEXIS 2972; 91 Fair Empl. Prac. Cas. (BNA) 280

February 19, 2003, Decided

PRIOR HISTORY:
Appeal from United States District Court for the Middle District of Louisiana. 98-CV-974-A. John V Parker, US District Judge.

DISPOSITION:
Affirmed.

COUNSEL:
For TINA BROOKS, SHIRLEY BROWN, ANNETTE J GRAY, MARY HOLMES, ANNIE JOHNSON, AMY LANE, ROSA MALVEAU, DOROTHY MCPIPE, ALMA NEWMAN, MAGGIE TUCKER, BERTHA TWINE, BERTHELLA WALLACE, EDNA WELCH, MARY WILLIAMS, NELLIE

WILLIAMS, Plaintiffs - Appellants: Nancy Picard, Robein, Urann & Lurye, Metairie, LA.

For EAST BATON ROUGE PARISH SCHOOL BOARD, INGRID KELLEY, WARREN L PRATT, JR, DR PRESS L ROBINSON, SR, JACQUELINE MIMS, PATRICIA HAYNE-SMITH, NOEL HAMMATT, ROGER MOSER, DANIEL R HENDERSON, ELDON R LEDOUX, DALTON DEVALL, WILLIAM P BLACK, JAMES MANLEY, Defendants - Appellees: Kenneth F Sills, Karen Denise Murphy, Hammonds & Sills, Baton Rouge, LA.

JUDGES:
Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS*, District Judge.

OPINION BY:
EMILIO M. GARZA

OPINION:
Before EMILIO M. GARZA, Circuit Judge:

Fifteen female plaintiffs (collectively, "Employees") formerly or currently employed as janitors by the East Baton Rouge Parish School Board appeal the district court's decisions granting summary judgment in favor of the Board, its individuals members, and James Manley, the Personnel Supervisor for the Board's Maintenance Department (collectively, the "Board"). In granting summary judgment, the district court dismissed Employees' Title VII retaliation and disparate impact discrimination claims, as well as their § 1983 retaliation claim, against

---

* District Judge of the Eastern District of Texas, sitting by designation.

the Board. Employees argue that the district court erred in concluding that Employees failed to make a prima facie showing of an adverse employment action under either Title VII or § 1983. According to Employees, the Board's implementation of a reading requirement and new salary structure for a new Janitor position, which was created pursuant to a consent decree entered into with the U.S. Department of Justice (the "DOJ"), thwarted Employees' immediate "promotion." This action, according to Employees, kept them from reaching their appropriate pay level and step and was, therefore, an adverse employment action under both Title VII and § 1983. Employees also argue that the district court erred in concluding that Employees failed to make a prima facie showing under Title VII that the reading requirement, implemented by the Board, selected applicants for the new Janitor position in a discriminatory pattern resulting in a sex-based imbalance in the Board's workforce.

I

We begin with a brief summary of the unique facts of this case. The Board employed janitors in three capacities: "Janitor I," "Janitor II," and "Janitor III." Janitor I employees, all of whom were female, worked part-time for six hours a day, nine months of the year. They were responsible for performing the most basic janitorial tasks. The Janitor II employees, most of whom were male, worked eight hours a day for the entire year. They were responsible for performing tasks essentially the same as those performed by Janitor I employees, with the addition of some duties, such as lawn care. Janitor III employees, all of whom were male, worked full-time and were responsible for performing tasks essentially the same as those

performed by Janitor I and Janitor II employees, with the addition of some supervisory tasks, such as locking up buildings and supervising cleaning crews.

The Employees, all of whom are female, were Janitor I employees. After the Board decided to eliminate the medical benefits received by Janitor I employees and to reduce their working hours (from six hours per day to four hours per day), a number of Janitor I employees, including Employees, sued the Board in state court, alleging that the Board's action had a disparate impact on female employees in violation of Louisiana state law, since all Janitor I employees were female. Their suit also alleged intentional sex discrimination in violation of Louisiana state law.

While the state court lawsuit was still pending,[1] the DOJ began an inquiry into the Board's procedures for placing women into the Janitor II and Janitor III positions. The impetus for the DOJ investigation was the allegation that the Board discriminated against women on the basis of their gender in violation of Title VII by reserving the Janitor II and Janitor III positions for males only.

Subsequently, the Board began to evaluate all school system positions, including job descriptions and salary schedules, for the stated purpose of eliminating the inefficient use of resources. All janitor and custodian classifications were included in this study. The Board decided to phase out the three-tiered janitor position and replace it with two new positions: "Janitor" and "Lead Janitor." The Janitor position (the "new Janitor position") combined the

[1] The state court ultimately dismissed the plaintiffs' lawsuit with prejudice. The plaintiffs chose not to appeal the state court judgment.

duties of the Janitor I and Janitor II positions. The "Lead Janitor" position was intended to be the equivalent of the Janitor III position. Both the new Janitor position and the Lead Janitor position were full-time positions, with medical benefits. However, the Board created a new pay scale, which resulted in lower hourly pay for any Janitor I employee who accepted the new Janitor position. Additionally, the Board implemented a testing procedure to select applicants for the new Janitor position. Applicants were required to take and pass a "practical" test involving the use of maintenance equipment, as well as a reading test, which tested an applicant's ability to read at an eighth-grade level. Applicants for the Lead Janitor position were not required to take either of these two tests.

The Board's implementation of the reading test for the new Janitor position was, according to the Board, its response to an incident in which at least one Board employee was sickened as a result of a custodian's failure to follow printed instructions on the use of a pesticide. The Board maintains that safety concerns demanded its new Janitors be able to read at an eighth-grade level, since the safety guidelines of the Occupational Safety and Health Administration were written on an eighth-grade level, as were most Material Safety Data Sheets, which are required for all chemicals used in the workplace.

The Board subsequently entered into a consent decree (the "Consent Decree") with the DOJ, which incorporated the Board's plan for the new Janitor position and Lead Janitor position, as well as its plan for a new salary structure. The purpose of the Consent Decree was to resolve all issues raised by the DOJ in a separate lawsuit that the DOJ, after its lengthy investigation of the Board, brought against the Board under Title VII, alleging

discrimination against females in the hiring and promotion of janitors. *See United States v. East Baton Rouge Parish Sch. Bd.,* No. 97-264-A-3. The Consent Decree provided that "interested and qualified incumbent employees in the Janitor I . . . positions [would] be provided . . . an opportunity to be promoted to the new Janitor position." It made no mention of the reading requirement, though it did state that "[a]pplicants selected for possible employment as Janitors or Lead Janitors may be required by the School Board to pass additional lawful and job-related selection devices or requirements."

Thereafter, when Employees (except those who chose not to do so) applied for the new Janitor position, they took the "practical" test and the reading test.[2] Though all passed the "practical" test, only one passed the reading test.[3] Unlike the day-by-day substitutes and applicants off the street who were later given an opportunity to apply for the new Janitor position, Janitor I employees who failed the reading test were given the option of either remaining in their old Janitor I jobs or taking the new Janitor position on a probationary basis, regardless of their current reading ability.[4] Attendance at adult reading classes was a

---

[2] Plaintiffs Dorothy Banks, Amy Lane, and Bertha Twine, who elected not to proceed with the application process for the new Janitor position, did not take the practical test or the reading test.

[3] Plaintiff Shirley Brown was the only one to pass both the practical test and the reading test. Brown was offered employment in the new Janitor position, which she accepted. She was placed on the step in the new salary schedule that corresponded to the step she had occupied in the Janitor I salary schedule.

[4] The day-by-day substitutes working for the Board were later offered an opportunity to apply for the new Janitor position. They, unlike the part-time Janitor I employees, were required to exhibit, at a

(Continued on following page)

condition of this probation. Those who accepted the probationary Janitor position would be paid at the lowest step in the new pay scheme until demonstrating an eighth-grade reading level on the retest, at which time the person would be moved up the salary schedule to a step corresponding to the step she had occupied on the old Janitor I salary schedule. According to Employees, some were informed that, if they failed the reading test a second time, they would lose their jobs; and all were informed that, if they decided to accept the new Janitor position on a probationary basis, they could not return to their old Janitor I positions. Employees also claim that they were informed that any Janitor I employee who failed the first reading test for the new Janitor position would not be allowed to remain in her current Janitor I position while preparing to retake the test. Also, according to Employees, when Plaintiff Rosa Malveau asked James Manley why the Janitor I employees had to take a reading test for the new Janitor position, Manley responded, "That's what you get for filing a lawsuit."

After filing a charge with the Equal Employment Opportunity Commission, in which Employees claimed that the Board discriminated against them on the basis of their gender and retaliated against them for participating in the state court lawsuit, Employees filed the instant suit against the Board in the federal district court. Their

---

minimum, a fifth grade reading level before being offered the job on a probationary basis. When the Board, after advertising the position to the public, began to fill vacancies in the Janitor position, it held those applicants to the eighth grade reading requirement; if they failed to exhibit an eight [sic] grade reading level, they were not offered the position.

federal suit claimed unlawful retaliation and disparate impact employment discrimination under Title VII, as well as unlawful retaliation under 42 U.S.C. § 1983. Concluding that Employees failed to state a prima facie case of retaliation or disparate impact discrimination under Title VII, or of retaliation under § 1983, the district court granted the Board's motion for summary judgment and dismissed all of Employees' claims.

We review the district court's grant of summary judgment *de novo*. *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 608 (5th Cir. 1998). Summary judgment is proper when there "is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Conoco, Inc. v. Medic Sys., Inc.*, 259 F.3d 369, 371 (5th Cir. 2001) (citation omitted). A court considering a motion for summary judgment must draw all reasonable inferences in favor of the non-moving party. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 189 (5th Cir. 1991).

II

Employees contend that the Board implemented the new salary structure and reading requirement for the new Janitor position in retaliation for Employees' participation in a previous state lawsuit against the Board. According to Employees, the district court erred in concluding that Employees failed to make a prima facie case of retaliation under Title VII.[5]

---

[5] Under Title VII,

> it is an unlawful practice for an employer to discriminate against any of his employees . . . because [the employee]

(Continued on following page)

To survive summary judgment in a Title VII retaliation case, the plaintiff must make a prima facie showing: "(1) that the plaintiff engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002). An employment action that "does not affect job duties, compensation, or benefits" is not an adverse employment action under Title VII. *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 769 (5th Cir. 2001). Only "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating" satisfy the adverse employment action element. *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (citation omitted). A demotion also qualifies as an adverse employment action under Title VII. *Sharp v. City of Houston*, 164 F.3d 923, 933 n.21 (5th Cir. 1999). Title VII does not, however, address "every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Burger v. Cent. Apartment Mgmt.*, 168 F.3d 875, 878 (5th Cir. 1999). For

---

has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The meaning of "discriminate" in § 2000e- 3(a) is informed by § 2000e-2(a)(1), which provides: "It should be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 191 (5th Cir.2001).

example, a decision made by an employer that only limits an employee's opportunities for promotion or lateral transfer does not qualify as an adverse employment action under Title VII. *See Burger,* 168 F.3d at 878-80 (holding that an employer's refusal of an employee's request for a "purely lateral transfer" does not qualify as an adverse employment action under Title VII); *Dollis,* 77 F.3d at 782 (affirming the decision that an employer's denial of a "desk audit" to a female employee is not an adverse personnel action under Title VII, even though the employee claimed it was an ultimate employment decision that restricted her "promotional opportunities").

Here, the district court reasoned that Employees failed to demonstrate that the Board's implementation of the reading requirement and new salary structure for the new Janitor position was an ultimate employment decision, since the creation of the new Janitor Position was not an "ordinary promotion situation," and since Employees had the choice of staying in their current Janitor I positions with no adverse consequences. However, according to Employees, the Board's implementation of a reading requirement and a new salary structure for the new Janitor position thwarted Employees' immediate "promotion" to their appropriate pay level and step,[6] and was,

[6] Employees argue that the Board's new policy for "promoting" Janitor I employees into the new Janitor position was out of sync with its established policy for promoting employees, and therefore thwarted their "promotion" to the appropriate pay level and step in the new Janitor position. The established policy of the Board for promoting an employee was to assign that employee to a pay grade called for by the new position at a step equal to or above his or her previous salary, plus 5%. In contrast, a Janitor I employee who accepted the new Janitor position was placed either at step zero (if she did not pass the reading

(Continued on following page)

therefore, an ultimate employment decision. The Board's placement of "onerous" conditions on the new Janitor position, Employees contend, denied Employees the greater hours, greater compensation, and medical benefits which they sought.

Regardless of whether the conditions placed on the new Janitor position were unfavorable to Employees seeking to be "promoted" to it, the Board's implementation of this new position, with its new salary structure and reading requirement, did not amount to an ultimate employment decision under Title VII. As the district court correctly reasoned, the move from Janitor I to the new Janitor position was not a part of "any internal ordered scheme of promotion to which the plaintiffs were entitled, either from years of service or job performance." Pursuant to the Consent Decree, which provided that "interested and qualified incumbent employees in the Janitor I ... positions [would] be provided ... an opportunity to be promoted to the new Janitor position," the Board gave Employees a right of first refusal for the new Janitor position.[7] Yet, Employees have not provided any authority

---

test) or in the same step of the new scale (if she passed the test), which was a lower hourly rate. Thus, Employees complain that, even though the Consent Decree characterized the move from the Janitor I position to the new Janitor position as an opportunity to be "promoted," those Janitor I employees would have to accept a lower pay rate in order to move into the new position, regardless of their experience. For example, Plaintiff Rosa Malveau, who was at step 15 of the Janitor I pay scale (G-12), $10.90 per hour, argues that the Board should have offered to place her in step 19 of the new Janitor scale (G-14), $11.03 per hour, instead of step zero, $5.82 per hour.

[7] Following the district court's approval of the Consent Decree, all Janitor I employees, including Employees, were contacted either by

(Continued on following page)

showing that an employer's act of giving an employee a right of first refusal for a new job can constitute an ultimate employment decision under Title VII. Neither have Employees demonstrated that, by giving Employees a right of first refusal for the new Janitor position, the Board in any way coerced Employees into accepting that position and its lower hourly wages.[8] On the contrary, the summary judgment evidence established that, consistent with the Consent Decree, Janitor I employees who either did not apply for the new Janitor position or did not accept the position on a probationary basis were allowed to stay in their Janitor I positions at their current wage rate and seniority status, free from adverse consequences.[9] Thus, the Board's implementation of the new Janitor position,

---

James Manley, or his secretary, regarding the new Janitor position. Janitor I employees were given the option of either going forward with the application process or remaining in their Janitor I positions. Those Janitor I employees interested in applying were directed to report to the Maintenance office complex to participate in testing designed to evaluate whether they possessed the qualifications required for the new Janitor position. Persons employed as Janitor I employees (including Employees herein, except those who chose not to participate) were the only ones tested at the first testing sessions for the new Janitor position. After completing the testing process, those who participated were contacted by Manley to discuss their test results and options, including the option of taking the new Janitor position on a probationary basis.

[8] Employees state that "almost all plaintiffs-appellants, like Ms. Malveau, rejected the new Janitor job because it meant too many more work hours for too little pay with too many risks. Only Maggie Tucker . . . accepted the new Janitor position, regardless of the cut in hourly pay."

[9] The Consent Decree directs that "an incumbent employee who declines the newly established Janitor or Lead Janitor position shall retain his or her current wage rate, seniority status, and other attendant benefits, if any."

for which Employees had a right of first refusal, did not constitute an ultimate employment decision because it did not affect Employees' job duties, compensation, or level of benefits as Janitor I employees. *See Hunt,* 277 F.3d at 769.

As for the reading requirement, Employees argue that its implementation was an ultimate employment decision by the Board because it "was represented to [Employees] as the requirement for an immediate promotion to a full-time position which they sought," and because it was a "stumbling block" to their "immediate promotion" to the full-time position, for which, Employees claim, they were qualified.[10] We do not agree that the Board's implementation of the reading requirement constituted an ultimate employment decision. Although the reading test prevented all but one of the Employees from making an immediate change to the new Janitor position, any of the Employees who failed the reading test still had the option of exercising her right of first refusal and occupying the new Janitor position on a probationary basis until the retest. Because Employees do not allege that the reading test was unfairly rigged to prevent them from passing, we may assume that the test was a fair assessment of reading skills. *See Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 709 (5th Cir. 1997) (reasoning that, because the plaintiff who failed two "Major Skills Tests" did not maintain that the tests were unfairly rigged, the tests were, presumably, a "correct

---

[10] Employees offered summary judgment evidence suggesting that the reading test was not an appropriate measure of the janitorial skills necessary to perform the work required of those in the new Janitor position, and that they were qualified for the new position because its duties were essentially the same as their duties as Janitor I employees.

assessment" of her ability to perform those skills). Even assuming that the Board told Employees they would lose their jobs if they accepted the probationary position but failed the retest, the Board's decision to implement the reading requirement was, at most, a mediate decision that *could lead* to an adverse employment decision for an applicant who failed that retest. Thus, the Board's decision to implement the reading requirement for the new Janitor position does not qualify as an ultimate employment decision under Title VII. *See Dollis,* 77 F.3d at 780 ("Title VII's anti-retaliation provision [does not] refer[ ] to . . . 'interlocutory or mediate' decisions which can lead to an ultimate decision." (internal quotations omitted)).

For these reasons, we conclude that Employees failed to show that the Board's implementation of the reading requirement and new salary structure for the new Janitor constituted an adverse employment decision.[11] We therefore hold that the district court correctly decided that Employees failed to make a prima facie showing of Title VII retaliation.

III

Employees argue that the Board's actions had a disparate impact on female janitorial employees, since the only persons impacted by the reading test were Janitor I employees, all of whom were female. Thus, according to

[11] Since Employees failed to make a prima facie showing of an adverse employment decision, we need not consider whether Employees established a causal link between the protected activity and the alleged adverse employment decision.

Employees, the district court erred in ruling that Employees failed to state a prima facie case of disparate impact employment discrimination under Title VII. The district court reasoned that Employees failed to show that the reading requirement resulted in a sex-based imbalance in the Board's workforce, regardless of any pre-existing imbalance in the workforce.

To establish a prima facie case of Title VII disparate impact employment discrimination, a plaintiff must show that the employer's facially neutral hiring standards select applicants in a significantly discriminatory pattern. *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)). Here, neither party disputes that the reading requirement was a facially neutral employment practice.[12] However, Employees contend that the Board's implementation of the reading requirement had a disparate impact on female employees. **According to Employees, female Janitor I employees were the only incumbent employees adversely impacted by the reading requirement, since the mostly-male Janitor II employees could place into Lead Janitor positions without having to take a reading test.** Employees contend that the Board "could not permissibly or lawfully create a new standard that impacted only female employees."

---

[12] Employees do not dispute that all persons, male and female, seeking full-time employment in the new Janitor position, whether a Janitor I, a day-by-day substitute, or off the street, were required to meet the reading requirement by demonstrating an ability to read at an eight [sic] grade level.

Initially, we must decide how to measure the alleged disparate impact. Employees propose that, as a group, incumbent employees who were required to take a reading test to place into any new janitorial or custodial position should be compared with all incumbent employees who placed into any new janitorial or custodial positions. The Board, however, correctly argues that the we [sic] should compare the group of applicants who placed into the new Janitor position with the entire pool of applicants for that new position. *See Bunch v. Bullard,* 795 F.2d 384, 395 (5th Cir. 1986) ("The threshold inquiry ... is whether the plaintiffs have shown that the tests in question select applicants for hire or promotion in a [sex] pattern significantly different from the pool of applicants."); *Page v. U.S. Indus., Inc.,* 726 F.2d 1038, 1053-54 (5th Cir. 1984) ("We have held that a showing of 'marked disproportion' between the representation of the allegedly disfavored group in the employer's workforce and its representation in the labor pool from which employees are selected suffices to establish a prima facie case of disparate impact.").

Using persons who placed into the new Janitor position and the entire pool of applicants for that position as groups for comparison, we must decide whether Employees presented either statistical or non-statistical evidence establishing a prima facie case of disparate impact. *See Page v. U.S. Industries Inc.,* 726 F.2d 1038, 1053 (5th Cir. 1984) ("A plaintiff may use statistical as well as non-statistical evidence in establishing a prima facie case of disparate impact."). Although the female Janitor I employees were given a right of first refusal for the new Janitor position, the position was otherwise open to both male and female applicants. Employees have not produced any statistical evidence tending to show that the reading

requirement operated in a way which selected applicants from the protected group – females – in a sex pattern "markedly disproportionate" from the entire pool of applicants for the new Janitor position, of which Employees were a part. *See Bunch,* 795 F.2d at 395 ("The tests must be 'significantly discriminatory' or at least create percentages which are 'markedly disproportionate.'") (quoting *Rivera v. City of Wichita Falls,* 665 F.2d 531, 534-35 (5th Cir. 1982)).[13] Neither have Employees produced non-statistical evidence demonstrating that the reading requirement selected females in a sex pattern significantly different from the entire pool of applicants for the new Janitor position. Employees simply argue that "Plaintiffs, all female, were the only ones impacted by the added reading test." Thus, Employees have failed to raise a genuine issue as to whether the facially neutral reading tests selected applicants in a significantly discriminatory sex pattern. We therefore hold that the district court

[13] Employees claim "there is no need to resort to a statistical analysis." The Board, however, provided statistical evidence showing that the selection of the protected group, females, actually exceeded the selection of the non-protected group, males. The Board explains that, since this position was created and these reading tests have been used, a total of 548 females and 471 males have applied for employment in this position. Of those applicants, 87 females (or 15.9% of the total female applicants) and 56 males (or 11.9% of the total male applicants) were selected for employment in the position. *Compare Bunch v. Bullard,* 795 F.2d 384, 395 (5th Cir. 1986) (determining that the observed disparity between the pass rate for blacks (23%), the protected group, compared with the pass rates for whites (80%), the non-protected group, for the IPMA promotional test was "great enough to permit the conclusion that a prima facie case of disparate impact [had] been established."). The Board also maintains that "the figures show that, in reality, more women have been selected for employment for the new janitor position than men despite the testing requirements.

correctly concluded that Employees failed to establish a prima facie case of Title VII disparate impact discrimination.

IV

Employees also contend that the district court erred in reasoning that Employees failed to make a prima facie showing of an adverse employment action under § 1983. Employees argue that, because of their participation in a state lawsuit against the Board, an activity protected by the First Amendment, the Board retaliated against them through its "failure to promote and pay [Employees] at the appropriate rate" and its "use of [an] inappropriate test to block [Employees'] rightful positions."

To state a claim of retaliation for exercise of First Amendment rights under § 1983, Employees must show that 1) they engaged in a protected activity, 2) they suffered an adverse employment action, 3) there was a causal connection between the two, and 4) the execution of a policy, custom, or practice of the Board caused the adverse action. *Sharp v. City of Houston,* 164 F.3d 923, 932 (5th Cir. 1999). Section 1983's definition of adverse employment action, like Title VII's definition, includes ultimate employment decisions, such as hiring, granting leave, discharging, promoting, demoting, and compensating. *Id.* at 933 n. 21.

Employees' § 1983 claim concerns the Board's alleged "failure to promote and pay at the appropriate rate" and "use of [an] inappropriate test to block [Employees'] rightful positions." Thus, Employees' § 1983 claim purportedly concerns promoting and compensating, activities which are characterized as ultimate employment actions

under § 1983 and Title VII. *Id.* However, in light of the analysis supporting our determination that Employees have failed to make a prima facie showing that the Board's implementation of a new salary structure and reading requirement for the new Janitor position constituted an ultimate employment action under Title VII, *see infra* Part II, we conclude that Employees have failed to make a prima facie showing that the Board's alleged "failure to promote and pay [Employees] at the appropriate rate" and "use of [an] inappropriate test to block [Employees'] rightful positions" constitutes an ultimate employment action under § 1983.

We recognize that § 1983's definition of adverse employment action may be broader than Title VII's definition, which limits the meaning of adverse employment action to ultimate employment decisions. *Sharp v. City of Houston,* 164 F.3d at 933 n.21. (citing *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 708 (5th Cir. 1997), *cert. denied,* 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997)). For example, the definition of adverse employment action under § 1983 may include reprimands and disciplinary filings, which do not qualify as ultimate employment decisions under Title VII. *See id.* Also, for purposes of a § 1983 claim, a transfer that is "equivalent to a demotion" can be an adverse employment action. 164 F.3d at 933. However, we need not consider whether the Board's alleged "failure to promote and pay [Employees] at the appropriate rate" or its "use of [an] inappropriate test to block [Employees'] rightful positions" meets § 1983's broadened definition of adverse employment action, since

Employees do not characterize such actions as a reprimand, disciplinary action, or transfer "equivalent to a demotion."[14]

For these reasons, we conclude that Employees failed to demonstrate an adverse employment action under § 1983. We therefore hold that the district court correctly decided that Employees failed to make a prima facie showing of retaliation under § 1983.

V

In sum, the district court did not err in deciding that the Board's implementation of the new Janitor position, with its reading requirement and new salary structure, did not qualify as an "adverse employment action" under Title VII, or under § 1983. Nor did the district court err in concluding that Employees failed to show that the Board's implementation of a reading requirement for the new Janitor position selected applicants in a significantly discriminatory sex pattern. Because Employees failed to

---

[14] Even though Employees argue that they had to accept lower hourly pay in order to move from Janitor I position to the new Janitor position, and that this was contrary to the Board's established policy for promoting employees to a step equal to or above their previous salary, plus 5%, Employees do not characterize the move from Janitor I to the new Janitor position as a transfer "equivalent to a demotion." Even if Employees had argued that the move qualifies as a transfer "equivalent to a demotion," it is unlikely that we would agree to characterize it as such, since Employees presented no evidence suggesting that they felt compelled to request a transfer to the new Janitor position. *See Sharp*, 164 F.3d at 934 (reasoning that the jury reasonably could equate the employee's requested transfer with a demotion because the employer waited until the employee felt "compelled to request a transfer").

state a prima facie case of retaliation or disparate impact employment discrimination under Title VII, and because Employees failed to state a prima facie case of retaliation under § 1983, we affirm the district court's grant of summary judgment in favor of the Board.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DOROTHY BANKS, ET AL

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 98-974-A

RULING

Subsequent to granting a motion for summary judgment upon all of the claims of plaintiffs under Title VII, 42 U.S.C. §2000e, et seq. (doc. 97), the court informed the parties that it was considering the propriety of granting summary judgment *sua sponte* on the remaining claims of plaintiffs under 42 U.S.C. §1983 (doc. 99) and invited both sides to submit briefs on that issue. Both sides have responded and the court has carefully reviewed the matter.

The court is now convinced that the same undisputed material facts that mandated dismissal of the Title VII claim also mandate dismissal of the §1983 claims.

There is no need for oral argument.

Facts and Procedure History

Plaintiffs are sixteen women formerly or currently employed as janitors by the East Baton Rouge Parish School Board ("School Board"). Prior to 1992, the School Board employed janitors in three different designations. These jobs were titled janitor I, janitor II, and janitor III. The janitor I position involved employment for six hours a

day during nine months of the year. Most of the janitor I positions were filled by female employees. The janitor II position involved work essentially identical to that performed by janitors I, with the addition of traditionally "male" duties, such as law [sic] care and other outside chores. The janitor II position was an eight hour a date [sic], year round position. Most of the janitor II positions were filled by males. The janitor II designation was a full time position entailing work identical to the other two positions, with the addition of some supervisory functions, such as locking up the buildings, and supervising late cleaning crews.

Plaintiffs were employed in the janitor I position. In June of 1992, the School Board decided to cut the hours of the janitor I job from six hours a week [sic], to four. Some benefits were also eliminated. In June of 1993, 46 female janitorial employees, including the plaintiffs, filed suit against the School Board in the 19th Judicial District Court, Parish of East Baton Rouge. The suit alleged that the reduction in hours and benefits had a disparate impact on female employees in violation of La. R.S. 51:2231, *et seq.*, as well as intentional discrimination in violation of La. R.S. 23:1006. The lawsuit is still pending.

For purposes of this issue before the court, the following material facts (which are the same undisputed facts in the court's prior ruling [doc. 97]) are admitted.

5. Plaintiffs herein are among those plaintiffs who filed a lawsuit in June, 1993 against the East Baton Rouge Parish School Board in state court alleging a violation of state law for the reduction of their hours in violation of L.R.S. 17:422.5, as well as employment discrimination on

the basis of sex in violation of L.R.S. 23:1006 and L.R.S. 51:2231, *et. seq.*, Louisiana's anti-discrimination statutes.

14. In April, 1997, a lawsuit was filed against the East Baton Rouge Parish School Board alleging discrimination in the hiring and promotion for Janitor II and Janitor III positions on the basis of sex in violation of Title VII, 42 U.S.C. §2000e, *et. seq.*, by the United States Department of Justice.

15. A settlement between the School Board and the Department of Justice was negotiated in the form of a consent decree.

16. The consent decree also required that the part-time Janitor I's would be given the opportunity to apply for the new Janitor position if they met the qualifications.

19. Beginning in approximately 1996, the School Board, through its then Associate Superintendent for Human Resources and Instruction, Christine (Chris) Arab, began evaluating all school system positions, including job descriptions and salary schedules, in an attempt to pinpoint those departments within the school system which were operating inefficiently.

20. The goal of this study was to illuminate areas in which the school system could save money and then use the funds for its instructional services.

21. All janitor and custodian classifications were included in this study.

29. An incident occurred where a custodian improperly used a chemical to eliminate ants from an office complex, causing at least one of its employees to require medical attention.

30. Upon questioning the custodian involved, Mr. James Broussard, former Risk Manager for the School Board, concluded that the employee involved could not read.

31. Mr. Broussard conducted an informal survey among the custodian supervisors and principals of schools regarding the perceived literacy problem among custodial and janitorial staff.

33. Mr. Broussard believed that the safety guidelines of OSHA were written at an eighth grade reading level.

34. Following this investigation, Mr. Broussard recommended to Mrs. Arab, his supervisor, that a reading requirement be placed into the job descriptions of the janitorial and custodial staff to avoid future incidents whereby persons could be injured due to an employee's inability to read and follow the directions provided on the chemicals used in everyday cleaning of the schools in the system.

37. In the fall of 1997, plaintiffs herein were among those persons contacted by the Human Resources Department for the Physical Plant Services department of the School Board and directed to report to the Maintenance office complex to participate in testing designed to evaluate the applicant's qualifications for the new full-time Janitor position.

38. The Janitor I's were given the option of choosing to go forward with the application process or to remain in their position as a Janitor I.

39. Those persons who reported, including plaintiffs herein, except for Dorothy Banks, Amy Lane, and Bertha Twine, were given a practical test to evaluate their skills

in operating equipment and in performing certain required tasks of the job.

40. The practical test evaluated an individual's ability to operate a lawn mower, a weed-eater, a floor buffing/cleaning machine, to climb ladders safely, to change light bulbs in the flourescent lighting fixtures in the schools, to change air conditioning filters, etc.

41. Plaintiffs were also subjected to a written Test of Adult Basic Education.

44. The requirement of an ability to read at an eighth grade level was included on the job description for the new Janitor position.

45. It was also provided in the Consent Decree approved by the court in June, 1997 that those applicants selected for possible employment in the new Janitor or Lead Janitor positions might be required by the School Board "to pass additional lawful and job-related selection devices or requirements."

56. Some plaintiffs who participated in the testing were contacted by Mr. James Manley to discuss their performance on the tests.

57. All plaintiffs passed the practical test, but only one plaintiff scored at an eighth grade reading equivalency on the Test of Adult Basic Education.

58. Even though most of the plaintiffs did not meet the reading requirement for the job, they were given the option of remaining in their Janitor I positions or taking the new position on a probationary basis, even if their reading level was at the kindergarten level. At such time as they reached an eighth grade reading level, each

plaintiff would be eligible for permanent status in that position.

69. On November 18, 1998, plaintiffs herein filed the instant lawsuit in the United States District Court for the Middle District of Louisiana, after having filed charges with the Equal Employment Opportunity Commission on behalf of themselves and others similarly situated, charging the School Board with discrimination against them on the basis of their sex, as well as retaliation for their being parties to the state lawsuit.

70. Plaintiffs alleged that the establishment of the conditions, qualifications and job description for the new full-time janitor position, including the requirement that applicants pass both the practical and reading tests before becoming eligible for employment in the position, was done by the defendants "with the intent to retaliate against female employees who had filed a lawsuit with the School Board [or] alternatively, the conditions that [the defendants] placed on this new position had a discriminatory impact on the plaintiffs."

On September 15, 2000, the defendants filed a motion for summary judgment as to the plaintiffs' claims under Title VII (doc. 73). The individual defendants also moved for summary judgment on the basis of their claim of qualified immunity (doc. 65), and for summary judgment as to the claims of plaintiffs Dorothy Banks, Bertha Twine, and Amy Lane (doc. 69).

On June 5, 2001, the court granted the defendants' Motion for Summary Judgment as to the Plaintiffs' claims under Title VII (doc. 97). In that ruling, the court held that the plaintiffs' allegations failed to satisfy the requisite elements of a Title VII retaliation claim. Specifically, the

court held that the actions complained of by the plaintiffs were not "adverse employment actions" in light of *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995), which held that only "ultimate employment decisions," such as "hiring, granting leave, discharging, promoting, and compensating," could qualify as "adverse employment actions." *Id.* at 782. On July 18, 2001, the court informed the parties that it was considering granting summary judgment, on its own motion, as to the plaintiffs' remaining sex discrimination claim under 42 U.S.C. §1983 (doc. 99). The parties have responded to the court's notice with memoranda.

DISCUSSION

As set forth in *Southard v. Texas Board of Criminal Justice*, 114 F.3d 539 (5th Cir. 1997):

> "To assert a cause of action for retaliation for the exercise of a federally protected right, a plaintiff must show that she:
>
> 1) engaged in a protected activity;
>
> 2) an adverse employment action followed; and
>
> 3) there was a causal connection between the activity and the adverse action." 114 F.3d at 554.

In *Southland* [sic], plaintiff claimed that the retaliatory action against her was less favorable work assignments. The Court stated:

> "Not every negative employment decision or event is an adverse employment action that can give rise to a discrimination or retaliation cause of action under section 1983.... Adverse

> employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands. . . . Undesirable work assignments are not adverse employment actions. . . . 114 F.3d at 555 (citations omitted).

Although the actions alleged by the plaintiffs might reasonably be construed to pertain to promotion, and thus to constitute an ultimate employment action, the undisputed material facts establish that the circumstances involved are significantly distinguishable from an ordinary promotion situation. As noted in the Title VII ruling:

> The move from janitor I to the new janitor position . . . was not a part of any . . . ordered scheme of promotion to which the plaintiffs were entitled, either from years of service, or job performance. Instead, the janitor position was a new job, for which the plaintiffs were given a right of first refusal before the position was offered to the public. Given this fact, and given the additional fact that the plaintiffs had the choice of staying where they were with no adverse consequences, this court finds that implementation of the new janitor position was not an ultimate employment decision. **Ruling on Motion for Summary Judgment** (doc. 97), p. 12.

Following a similar rationale, the court now finds that under the undisputed facts, the plaintiffs cannot establish an essential element of their claim of sex discrimination under 42 U.S.C. §1983, i.e., that they were subjected to an adverse employment action.

The plaintiffs argue that the definition of "adverse employment action" may be different under §1983 than under title VII, citing *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999).[1] The court recognizes that possibility. Nevertheless, promotion is the only category of potential adverse employment actions relevant to the facts alleged by the plaintiffs. Accordingly, the court concludes that the actions of the School Board do not constitute an adverse employment action despite their superficial similarity to "promotion."

A district court may grant summary judgment *sua sponte*, provided that the losing party is given adequate notice in order to allow it to marshal its arguments in opposition. *Scott v. Mississippi Department of Corrections*, 961 F.2d 77 (5th Cir. 1992); *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24 (1st Cir. 1996). Fair notice has been given here, and the plaintiffs have not come forward with evidence or authority sufficient to support their remaining claim. While summary judgment on the court's own motion is an extraordinary action which should be used sparingly,

---

[1] The city urges that *Mattern v. Eastman Kodak Co.* . . . , a title VII case, precludes a finding of "adverse employment action" by limiting that phrase to "ultimate employment decisions," which would include, for example, reprimands. The definition of "adverse employment action," however, may be different under title VII from its definition under §1983. See *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997) (stating that under title VII, ultimate employment decisions include hiring, discharging, promoting, compensating, or granting leaves, but not reprimands) *Mattern*, 104 F.3d at 707-08 (excluding disciplinary filings and reprimands from ultimate employment decisions). But this case does not implicate the potential differences between title VII's and 1983's definitions of "adverse employment action," because under both statutes demotions can be adverse employment actions. *Sharp*, 164 F.3d at 933, n. 21.

the resolution of the issue of the plaintiffs' claims under title VII leads inevitably to the conclusion that their action under 42 U.S.C. § 1983 must also fail.

Accordingly, judgment is hereby entered, dismissing the plaintiffs' remaining claim of sex discrimination under 42 U.S.C. §1983 and this action shall be dismissed.

Baton Rouge, Louisiana, December 12, 2001.

JOHN V. PARKER,
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DOROTHY BANKS, ET AL
(#84575)

VERSUS

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 98-974-A

JUDGMENT

For written reasons assigned and filed herein on June 5, 2001 (doc. 97) and on December 12, 2001 (doc. 104);

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered herein dismissing this action.

Baton Rouge, Louisiana, December 14, 2001.

/s/ John V. Parker
JOHN V. PARKER, JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DOROTHY BANKS, ET AL

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION

NO. 98-974-A

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on motion of defendant East Baton Rouge Parish School Board for Summary Judgment (Doc. No. 73). There is no need for oral argument. Plaintiffs have filed a memorandum in opposition. This court has jurisdiction pursuant to 28 U.S.C. § 1331.

Background

Plaintiffs are sixteen women formerly or currently employed as janitors by the East Baton Rouge Parish School Board ("School Board"). Prior to 1992, the School Board employed janitors in three different designations. These jobs were titled janitor I, janitor II, and janitor III. The janitor I position involved employment for six hours a day during nine months of the year. Most of the janitor I positions were filled by female employees. The janitor II position involved work essentially identical to that performed by janitors I, with the addition of traditionally "male" duties, such as lawn care and other outside chores. The janitor II position was an eight hour a day, year round position: Most of the janitor II positions were filled by males. The janitor III designation was a full time position entailing work identical to the other two positions, with

the addition of some supervisory functions, such as locking up the buildings, and supervising late cleaning crews.

Plaintiffs were employed in the janitor I position. In June of 1992, the School Board decided to cut the hours of the janitor I job from six hours a week [sic], to four. Some benefits were also eliminated. In June of 1993, 46 female janitorial employees, including the plaintiffs, fled [sic] suit against the School Board in the Nineteenth Judicial District Court, Parish of East Baton Rouge. The suit alleged that the reduction in hours and benefits had a disparate impact on female employees in violation of La. R.S. 51:2231, et seq., as well as intentional discrimination in violation of La. R.S. 23:1006. This lawsuit is still pending.

Shortly after the filing of the state court lawsuit, the United States Department of Justice began an inquiry into the hiring practices of the School Board with regard to the placement of women in the janitor II and III positions.

In 1996, the School Board began evaluating all positions within the district with an eye toward eliminating inefficient use of resources. Pursuant to this effort, it was decided that the three-tiered janitor position would be eliminated, and replaced with two new positions, janitor, and lead janitor. The janitor position would correspond with the old janitor I and janitor II positions. The lead janitor position would be the equivalent of the old janitor III classification. Both positions were to be full time jobs, with medical benefits. The School Board decided that present janitorial employees who did not wish to apply for the new positions could keep their old jobs.

The School Board also states that it had determined that its janitors were overpaid, through reference to

Louisiana Department of Labor statistics for average salaries in the region. Accordingly, the School Board changed the pay scale system for janitors, which resulted in lower hourly pay. A testing procedure was put into place for applicants to the new janitor I positions. Applicants were required to take a "practical" test, involving the use of maintenance equipment, and a reading test. Applicants for the new lead janitor position were not required to take these tests.

The reading requirement was implemented following an incident in which at least one School Board employee was sickened due to a custodian's failure to follow printed instructions on the use of a pesticide. The School Board states that it conducted an investigation into the reading ability of its janitorial employees, which revealed that many of them were illiterate. The School Board felt that safety concerns demanded that its new janitors read at least at the eighth grade level. The School Board states that this reading level was determined based upon the fact that the safety guidelines of the Occupational Safety and Health Administration (OSHA) were written on the eighth grade level, as were most Material Safety Data Sheets. Applicants for the new lead janitor position were not subjected to the reading test.

The School Board's plan for the new janitor positions was incorporated into a consent decree between the School Board and the U.S. Department of Justice in June, 1997. The reading requirement was not specifically made a part of the consent decree, although the decree did state that "[a]pplicants selected for possible employment as Janitors or Lead Janitors may be required by the School Board to pass additional lawful and job-related selection devices or

requirement [sic]." Consent Decree (defendants' Exhibit H), p. 8.

In the fall of 1997, the plaintiffs were contacted by the office of Mr. James Manley, Personnel Supervisor for the Maintenance Department of the School Board, regarding their interest in applying for the new janitor position. While all of the plaintiffs passed the practical test, all but one failed the reading test. The plaintiffs who failed the reading test were given the option of remaining in their old janitor I jobs, or taking the new janitor position on a probationary basis. Attendance at adult reading classes at night was a condition of this probation. Those accepting the probationary position would be paid at the lowest step in the new pay scheme until such time as they were able to satisfy the reading requirement. At that point, they would be moved up the salary scale to reflect the position on the scale that they had occupied in their old janitor I jobs.

The plaintiffs state that Mr. Manley gave conflicting information regarding the consequences of failing the reading test, and accepting the probationary janitor position. According to the plaintiffs, some were told that if they failed the reading test a second time, that they would be terminated. Others were told by Manley that he did not know what would happen to them if they failed to pass the reading test. The plaintiffs state that all were told that if they decided to take the new janitor position on a probationary basis, that they could not return to their old janitor I positions. The plaintiffs also state that they were told that remaining in their current positions while preparing to retake the reading test was not an option.

The plaintiffs filed suit in this court in November, 1998, claiming unlawful retaliation and disparate impact under Title VII. Plaintiffs allege that the School Board established the conditions, qualifications, and job description for the new full time janitor position with the intent to retaliate against them for their participation in the earlier state court discrimination suit. Alternatively, the plaintiffs claim that the condition placed on the new janitor position, specifically the reading requirement, had a disparate impact on female employees.

Summary Judgment Facts

Defendants have submitted a statement of uncontested facts in support of their motion for summary judgment, in accordance with Local Rule 56.1. The plaintiffs have responded, admitting some of these facts, and denying others. For the purpose of this court's decision on the instant motion, the following material facts are admitted:

5. Plaintiffs herein are among those plaintiffs who filed a lawsuit in June, 1993 against the East Baton Rouge Parish School Board in state court alleging a violation of state law for the reduction of their hours in violation of L.R.S. 17:422.5, as well as employment discrimination on the basis of sex in violation of L.R.S. 23:1006 and L.R.S. 51:2231, et. seq., Louisiana's anti-discrimination statutes.

14. In April, 1997, a lawsuit was filed against the East Baton Rouge Parish School Board alleging discrimination in the hiring and promotion for Janitor II and Janitor III positions on the basis of sex in violation of Title VII, 42 U.S.C. §2000e; et. seq., by the United States Department of Justice.

15. A settlement between the School Board and the Department of Justice was negotiated. in the form of a consent decree.

16. The consent decree also required that the part-time Janitor I's would be given the opportunity to apply for the new Janitor position if they met the qualifications.

19. Beginning in approximately 1996, the School Board, through its then Associate Superintendent for Human Resources and instruction, Christine (Chris) Arab, began evaluating all school system positions, including job descriptions and salary schedules, in an attempt to pin-point those departments within the school system which were operating inefficiently.

20. The goal of this study was to illuminate areas in which the school system could save money and then use the funds for its instructional services.

21. All janitor and custodian classifications were included in this study.

29. An incident occurred where a custodian improperly used a chemical to eliminate ants from an office complex, causing at least one of its employees to require medical attention.

30. Upon questioning the custodian involved, Mr. James Broussard, former Risk Manager for the School Board, concluded that the employee involved could not read.

31. Mr. Broussard conducted an informal survey among the custodian supervisors and principals of schools regarding the perceived literacy problem among custodial and janitorial staff.

33. Mr. Broussard believed that the safety guidelines of OSHA were written at an eighth grade reading level.

34. Following this investigation, Mr. Broussard recommended to Mrs. Arab, his supervisor, that a reading requirement be placed into the job descriptions of the janitorial and custodial staff to avoid future incidents whereby persons could be injured due to an employee's inability to read and follow the directions provided on the chemicals used in everyday cleaning of the schools in the system.

37. In the fall of 1997, plaintiffs herein were among those persons contacted by the Human Resources Department for the Physical Plant Services department of the School Board and directed to report to the Maintenance office complex to participate in testing designed to evaluate the applicant's qualifications for the new full-time Janitor position.

38. The Janitor I's were given the option of choosing to go forward with the application process or to remain in their position as a Janitor I.

39. Those persons who reported, including plaintiffs herein, except for Dorothy Banks, Amy Lane, and Bertha Twine, were given a practical test to evaluate their skills in operating equipment and in performing certain required tasks of the job.

40. The practical test evaluated an individual's ability to operate a lawn mower, a weed-eater, a floor buffing/cleaning machine, to climb ladders safely, to change light bulbs in the flourescent lighting fixtures in the schools, to change air conditioning filters, etc.

41. Plaintiffs were also subjected to a written Test of Adult Basic Education.

44. The requirement of an ability to read at an eighth grade level was included on the job description for the new Janitor position.

45. It was also provided in the Consent Decree approved by the court in June, 1997 that those applicants selected for-possible. employment in the new Janitor or Lead Janitor positions might be required by the School Board "to pass additional lawful and job-related selection devices or requirements."

56. Some plaintiffs who participated in the testing were contacted by Mr. James Manley to discuss their performance on the tests.

57. All plaintiffs passed the practical test, but only one plaintiff scored at an eighth grade reading equivalency on the Test of Adult Basic Education.

58. Even though most of the plaintiffs did not meet the reading requirement for the job, they were given the option of remaining in their Janitor I positions or taking the new position on a probationary basis, even if their reading level was at the kindergarten level. At such time as they reached an eighth grade reading level, each plaintiff would be eligible for permanent status in that position.

69. On November 18, 1998, plaintiffs herein filed the instant lawsuit in the United States District Court for the Middle District of Louisiana, after having filed charges with the Equal Employment Opportunity Commission on behalf of themselves and others similarly situated, charging the School Board with discrimination against them on

the basis of their sex, as well as retaliation for their being parties to the state lawsuit.

70. Plaintiffs alleged that the establishment of the conditions, qualifications and job description for the new full-time janitor position, including the requirement that applicants pass both the practical and reading tests before becoming eligible for employment in the position, was done by the defendants "with the intent to retaliate against female employees who had filed a lawsuit with the School Board [or] alternatively, the conditions that [the defendants] placed on this new position had a discriminatory impact on the plaintiffs."

Discussion

A. Retaliation under Title VII

The plaintiffs claim that the School Board established the new janitor position, with its attendant requirements, with intent to retaliate against them for their state court discrimination suit, in violation of Title VII §704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.A. § 2000e3(a).

In order to state a prima facie retaliation claim under Title VII, a plaintiff must show three elements. First, that he or she engaged in an activity protected from retaliation

under Title VII. Second, that he or she was subjected to an adverse employment action. Third, the plaintiff must show a causal connection between the protected activity, and the alleged retaliatory action. **Shirley v. Chrysler First, Inc.**, 970 F.2d 39,42 (5thCir.1992); **Mayberry v. Vought Aircraft Co.**, 55 F.3d 1086 (5th Cir. 1995).

The defendants do not dispute the fact that participation in a lawsuit alleging discrimination is a protected activity under Title VII. The School Board, however, disputes the remaining two elements, arguing that there was no adverse employment action taken against the plaintiffs, and even if there was, no causal connection can be established between such action, and the protected activity.

The plaintiffs characterize the adverse employment action in this case as "a bogus reading prerequisite established to block (the plaintiffs') promotion to a full time position." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p.15. The plaintiffs argue that the School Board's actions left them confronted with the choice of accepting a the [sic] new janitor position on a probationary basis, with the attendant burdens of adult reading classes and ongoing uncertainty about their employment futures if they failed to pass the reading test, or remaining in their janitor I positions with no benefits, and no hope of promotion.

The meaning of "adverse employment action" has been clarified by Fifth Circuit case law. In **Dollis v. Rubin**, 77 F.3d 777 (5th Cir.1995), the court stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those

ultimate decisions." **Id** at 781-82. Ultimate employment decisions include actions such as "hiring, granting leave, discharging, promoting, and compensating." **Id.** at 782. (Citing **Page v. Bolger**, 645 F.2d 227, 233 (4th Cir.) (en banc), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981)); **Mattern v. Eastman Kodak Company**, 104 F.3d 702 (5th Cir. 1997). Thus, actions taken by an employer that fail to rise to the level of "ultimate employment decisions" are not "adverse employment actions" within the meaning of Title VII.

The defendants argue that this standard precludes a finding that their decision to implement the new janitor position, with its attendant reading requirement, constituted an adverse employment decision within the meaning of Title VII. The School Board points to the fact that the plaintiffs were allowed the choice to keep their janitor I jobs, or to apply for the new janitor position, and argues that whether or not the plaintiffs passed the reading test did not affect their status as employees of the School Board.

The only category of actions cited in **Dollis** to which the School Board's decision to implement the new janitor position with its reading requirement might correspond is "promotion." Thus, it could be argued that the School Board's decision effectively denied the plaintiffs a promotion, which could constitute an ultimate employment decision. The move from janitor I to the new janitor position, however, was not a part of any internal ordered scheme of promotion to which the plaintiffs were entitled, either from years of service, or job performance. Instead, the janitor position was a new job, for which the plaintiffs were given a right of first refusal before the position was offered to the public. Given this fact, and given the

additional fact that the plaintiffs had the choice of staying where they were with no adverse consequences, this court finds that implementation of the new janitor position was not an ultimate employment decision.

Accordingly, the plaintiffs have failed to state a prima facie case of retaliation under Title VII. The defendants are entitled to summary judgment on this issue.

B. Disparate Impact

In the alternative, the plaintiffs argue that the reading requirement had a disparate impact on female employees within the meaning of Title VII. The plaintiffs contend that they were the only School Board employees impacted by the reading requirement, as they were the only current employees interested in moving into the new janitor position, whose additional hours and benefits constituted a promotion for them. Current janitors II, by contrast, could simply choose to remain in their full time janitor II positions, or apply for lead janitor positions, thereby circumventing the reading requirement.

In order to establish a claim of disparate impact employment discrimination, a class of plaintiffs must show that a facially neutral employment practice results in a significantly adverse impact on a protected class. **Griggs v. Duke Power Company**, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The facts of this case, however, do not readily lend themselves to analysis under a disparate impact theory. The disparate impact theory is usually applied to show that an employment practice results in a sexual or racial disparity in the workforce. The plaintiffs complain of the

fact that the reading test was applied to them, while mostly male janitor II employees could avoid the test, either by remaining in their janitor II positions, or by applying for lead janitor positions, for which no reading test was mandated.

In **Pouncy v. Prudential Insurance Company of America**, 688 F.2d 795 (5th Cir. 1982), the court stated that "[t]he disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the workforce." **Id.** at 800. Later in the opinion, the court again stressed that "the disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the workforce." **Id.** at 801.

The plaintiffs have failed to show that the reading requirement resulted in a sex based imbalance in the School Board's workforce. The fact that the institution of this requirement fell totally on part time female janitorial employees may reflect a pre-existing imbalance resulting from other factors, but the disparate impact theory properly focuses on results.

Accordingly, the defendants' Motion for Summary Judgment (Doc. No. 73) is hereby GRANTED and this action shall be dismissed.

Baton Rouge, Louisiana, June 5, 2001.

JOHN V. PARKER,
UNITED STATES DISTRICT
JUDGE
MIDDLE DISTRICT OF
LOUISIANA

(2)

FILED
JUN 25 2003
OFFICE OF THE CLERK

No. 02-1717

IN THE

Supreme Court of the United States

JUAN HERNANDEZ,

Petitioner,

v.

CRAWFORD BUILDING MATERIAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EAST BATON ROUGE PARISH SCHOOL BOARD, INDIVIDUAL SCHOOL BOARD MEMBERS & JAMES MANLEY

KENNETH F. SILLS
Counsel of Record
KAREN D. MURPHY
HAMMONDS & SILLS
1111 South Foster Drive
Suite C
Baton Rouge, Louisiana 70806
(225) 923-3462

Attorneys for Respondents East Baton Rouge Parish School Board, individual School Board members & James Manley

181479

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. Course of the Proceedings.	1
B. Statement of Facts.	3
Reasons for Denying the Petition	6
I. Alleged Conflict As To The Proper Definition Of "Adverse Employment Action" For Purposes Of Establishing A Federal Retaliation Claim Is Not Determinative Of Issues In This Case.	6
II. A Disagreement Between Federal Agencies As To The Appropriate Interpretation Of Federal Law Is Not An Adequate Basis For A Grant Of Writ Of Certiorari.	10
III. The Decision Of The Fifth Circuit In *Banks* Does Not Conflict With This Court's Decision In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Banks v. East Baton Rouge Parish School Board, 320 F.3d 570 (5th Cir. 2003) . . . 2, 3, 4, 5, 6, 7, 8, 11, 12, 13

Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (2002) 11

EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) 11

General Elec. Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) 11

Graham v. State Farm Mutual Ins. Co., 193 F.3d 1274 (11th Cir. 1999) 6

Greenlees v. Eidenmuller Enters., 32 F.3d 197 (5th Cir. 1994) 11

Gupta v. Florida Bd. of Regents, 212 F.3d 571 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001) 8

Heuer v. Weil-McLain, 203 F.3d 1021 (7th Cir. 2000) 10

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996) 10

Cited Authorities

	Page
Ledergerber v. Stangler, 122 F.3d 1142 (8th Cir. 1997)	7
Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997)	8
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)	11
Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991)	9
Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000)	11
Richardson v. New York State Dept. of Correctional Serv., 180 F.3d 426 (2d Cir. 1999)	7, 9
Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)	11, 12, 13
Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997)	7, 8
Vasquez v. County of L.A., 307 F.3d 884 (9th Cir. 2002)	6, 9
Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001)	6

Cited Authorities

Page

Wideman v. Wal-Mart Stores, 141 F.3d 1453 (11th Cir. 1998) 9

Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 1994) ... 9

United States Constitution:

Fourteenth Amendment 1

Statutes:

L.R.S. 23:1006 5

L.R.S. 51:2231, *et seq.* 5

42 U.S.C. § 1983 ..... 1, 2

42 U.S.C. § 2000e, *et seq.* 1

42 U.S.C. § 2000e-3(a) 6, 10, 11, 12

Rules:

Fed. R. Civ. P. 12(b)(6) 1, 9

U.S. Sup. Ct. R. 10 10

STATEMENT OF THE CASE

A. Course of the Proceedings.

Petitioners filed suit in the instant matter on November 18, 1998 against Respondents, the East Baton Rouge Parish School Board, each individual member of the Board, as well as James Manley, a Supervisor of Human Resources (all hereinafter collectively referred to as "School Board"). In their complaint, Petitioners alleged they suffered disparate impact discrimination on the basis of their gender in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, the Civil Rights Act of 1964, as amended, when the School Board created a new janitorial position with attendant job qualifications and salary changes. Petitioners also claimed the actions of the School Board were retaliatory under both Title VII and 42 U.S.C. § 1983 because of their having engaged in prior protected activity.

The School Board moved for dismissal of Petitioners' claims in a Federal Rule of Civil Procedure 12(b)(6) motion arguing that Petitioners had failed to allege a separate constitutional or statutory basis (other than Title VII) for their position that the School Board had violated their rights pursuant to § 1983. The motion to dismiss was also based on the right of the individual School Board member defendants and Mr. Manley to qualified immunity from liability. Thereafter, the District Court denied the School Board's motion to dismiss on all grounds finding that claims of sex discrimination have been found to be violative of the Fourteenth Amendment to the U.S. Constitution and that this would be sufficient to serve as a separate constitutional basis for Petitioners' § 1983 claims.[1]

---

1. The School Board also filed a Motion for Summary Judgment regarding Petitioners' collateral attack on a Consent Decree. The District Court denied that motion as well.

Following the conclusion of discovery, the School Board filed three (3) motions for summary judgment. The motions separately addressed (1) Petitioners' claims under Title VII, (2) the right of three (3) specific employees to pursue claims against the School Board, and (3) the right of the individual defendants to qualified immunity. The District Court, after considering all the evidence presented, ruled on June 5, 2001 that Petitioners failed to present proof sufficient to create a genuine issue of material fact as to their claims under Title VII for retaliation and disparate impact discrimination. The Court then dismissed Petitioners' suit in its entirety. (Pet. App. pp. 62a-75a).

Later, on June 25, 2001, the District Court amended its order and acknowledged Petitioners' remaining claim against the School Board under § 1983. The District Court then *sua sponte* ordered the parties to present briefs for its review in consideration of possible dismissal of Petitioners' claims under that statute. On December 14, 2001, the Court dismissed Petitioners' claims under § 1983 for the same reasons it gave for the dismissal of their claims under Title VII. (Pet. App. pp. 51a-60a).

Petitioners then appealed the dismissal of their claims under Title VII and § 1983 to the United States Fifth Circuit Court of Appeals. On February 19, 2003, the Fifth Circuit affirmed the district court's decision in all regards. The Fifth Circuit held that Petitioners had failed to establish a *prima facie* case of retaliation under either Title VII or § 1983 and that Petitioners had also failed to establish a *prima facie* case of disparate impact discrimination. *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir. 2003) (Pet. App. pp. 30a-50a). Petitioners have now applied for writs to this Court seeking review of only the Fifth Circuit's ruling with regard to their claims of retaliation under Title VII and § 1983.

B. Statement of Facts.

As the Fifth Circuit acknowledged in its opinion, the facts of this case are "unique." 320 F.3d at 572 (Pet. App. p. 32a). There are also very few, if any, contested facts as demonstrated by both the opinion of the district court and the Court of Appeals below. (Pet. App. pp. 51a-60a; 62a-75a; 30a-50a). The undisputed facts essentially show that the positions at the heart of Petitioners' complaint were created in response to an independent, internal study of all positions (including salaries) with the School Board, as well as in an effort to resolve claims made by the United States Department of Justice ("DOJ") against the School Board relative to the placement of women in certain janitorial positions. 320 F.3d at 573, 574 (Pet. App. pp. 33a-35a).

The Consent Decree entered into between the School Board and the DOJ required that individuals employed in the part-time position of Janitor I (such as Petitioners) be given the first opportunity to apply for and be placed in the new full-time position of Janitor *if* they met the qualifications for employment in the new position.[2] 320 F.3d at 576 (Pet. App. p. 40a). The undisputed facts established that this was a new position, not simply a reclassification of an old one. Contrary to Petitioners' assertions, everyone who applied for the new position of Janitor (including Petitioners) was required to exhibit competency in performing certain manual tasks and to demonstrate an ability to read at the eighth grade level or higher before being offered employment in the position. 320 F.3d at 578 n.12 (Pet. App. p. 44a). Selection to serve in the new position of Janitor was based on the qualifications of the applicants and was not a "promotion" to which Petitioners "were entitled, either from years of service or job performance." 320 F.3d at 576 (Pet. App. p. 40a).

---

2. The new position of Janitor for which Petitioners had the right of first refusal was a full-time position with benefits but was paid at a lower hourly salary than the old janitor position.

In accordance with its obligations under the Consent Decree, the School Board contacted Petitioners about their interest in applying for the new position and the majority indicated they would like to apply.[3] Petitioners were subsequently scheduled for the requisite testing and were the only ones to participate in the testing on that given day because of their right of first refusal for the job. 320 F.3d at 576 n.7 (Pet. App. pp. 40a-41a). All Petitioners who participated in the application process passed the "practical" test which was designed to evaluate their skills in operating equipment and in performing certain other required tasks. 320 F.3d at 573, 574 (Pet. App. pp. 34a-35a). Only one of the Petitioners, however, exhibited the ability to read on at least the eighth grade level. 320 F.3d at 574 (Pet. App. p. 35a).

Despite their respective reading levels, Petitioners were given the opportunity by the School Board to move into the new position of Janitor as long as they agreed to participate in adult education classes and retake the reading test at a later date. 320 F.3d at 574, 577 (Pet. App. pp. 35a, 42a). They were also told that, if they accepted the new position, they would be paid at the lowest step on the salary schedule for that position *until* such time as they demonstrated the ability to read at the eighth grade level; they would then be moved up the salary schedule to the step corresponding to that which Petitioner had occupied on the old janitor salary schedule. 320 F.3d at 574 (Pet. App. p. 36a). Petitioners were also given the right to choose whether they wanted to take the new position of Janitor under these conditions or remain in their old Janitor I job. *Ibid.* (Pet. App. p. 35a).

---

3. At the time, Petitioners were all active employees of the School Board. Three employees, Bertha Twine, Amy Lane, and Dorothy Banks, indicated they did not wish to participate in the application process.

Petitioners thereafter filed suit against the School Board claiming, *inter alia*, that the School Board's action in creating the new position of Janitor (with its attendant salary schedule and employment criteria) was taken in retaliation against them because they had filed a lawsuit in June, 1993 against the School Board in Louisiana state district court. In the state court proceeding, the Petitioners alleged, *inter alia*, that the School Board had discriminated against them on the basis of their gender in violation of L.R.S. 23:1006 and L.R.S. 51:2231, *et seq.* (Louisiana's anti-discrimination statutes) when it reduced the number of hours per day that they worked (and their benefits) as part of a system-wide reduction in expenditures. Petitioners' claims were tried to the state court and, on November 30, 2000, were dismissed by the court with prejudice.[4] Petitioners chose not to appeal that judgment. 320 F.3d at 573 n.1 (Pet. App. p. 33a). In the case at hand, Petitioners' claims were ultimately dismissed on summary judgment by the district court. On appeal, the Fifth Circuit found that Petitioners (unlike others who applied for the new position of Janitor) were allowed to move into the new position regardless of their reading ability. 320 F.3d at 574 n.4 (Pet. App. pp. 35a-36a). It further found that the summary judgment evidence established that the School Board had complied with its obligations under the Consent Decree by allowing Petitioners the choice of (1) staying in their current position with no adverse consequences or (2) applying for and accepting employment in the new position with its attendant criteria. *Id.* at 577 (Pet. App. p. 41a).

In addition, the Court found that Petitioners had not shown that the School Board had coerced Petitioners into taking the new position or that the act of giving an employee a right of first refusal constituted an adverse employment action. *Ibid.* Given

4. Docket # 395,944, Div. "I" of the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

this, the Fifth Circuit held that the School Board's actions in creating "the new janitor position, for which [Petitioners] had a right of first refusal, did not constitute an ultimate employment decision because it did not affect [Petitioners'] job duties, compensation, or level of benefits as Janitor I employees." *Ibid.* (Pet. App. pp. 41a-42a).

REASONS FOR DENYING THE PETITION

I. Alleged Conflict As To The Proper Definition Of "Adverse Employment Action" For Purposes Of Establishing A Federal Retaliation Claim Is Not Determinative Of Issues In This Case.

Petitioners assert that the Fifth Circuit defines the term "adverse employment action" more strictly than the other courts of appeal and that, because of this, they were improperly denied the right to pursue their claims against the School Board. The fact is, however, that, despite the terms used by the circuits to define what constitutes an "adverse employment action", the circuits agree that there must be some action taken by an employer that results in an adverse change in the terms or conditions of the individual's employment before a cause of action exists pursuant to Section 704(a) of Title VII. *Banks*, 320 F.3d at 577 (employer's actions did not affect employees' job duties, compensation or level of benefits); *Vasquez v. County of L.A.*, 307 F.3d 884, 890 (9th Cir. 2002) ("disadvantageous changes in the workplace . . . constitute adverse actions, . . .); *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary . . . is evidence that the challenged discriminatory acts . . . adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."); *Graham v. State Farm Mutual Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (plaintiff suffered no repercussions from actions of employer);

Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (plaintiff must suffer an adverse employment action that affected the terms or conditions of employment); and *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997) (plaintiff has not shown she suffered a materially adverse change in the terms or conditions of employment).

That there may be a conflict among the circuit courts of appeals as to how to define an element of proof in a retaliation claim under Title VII (or other federal anti-discrimination law) is a non-issue in this case. No matter which definition is used, the actions complained of by Petitioners do *not* qualify as adverse employment actions sufficient to make out a *prima facie* case of retaliation.

The actions about which Petitioners complain consist of the creation of a new janitorial position together with a new salary schedule, as well as establishment of employment criteria for the new position. The School Board is hard pressed to see how these actions qualify as adverse to Petitioners when employment in the position was not promised to Petitioners nor were they entitled to employment in the position on the basis of experience or length of service. *Banks*, 320 F.3d at 576 (Pet. App. p. 40a). Instead, as found by the Fifth Circuit, the School Board allowed Petitioners the right of first refusal to move into the position regardless of their ability to meet the employment criteria for the job and then left the decision to the individual whether to take the new job or stay in the old one free from adverse consequences. 320 F.3d at 577 (Pet. App. p. 41a). *See Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 450 (2d Cir. 1999)

> While there is caselaw that quite properly holds that an involuntary transfer to a different job can be found by a trier of fact to have been an adverse employment decision, it hardly applies in circumstances

> where. . . . the employer offers the only job available, leaving the decision whether or not to transfer to the employee. (Internal citations omitted).

(Winter, Chief Judge, Dissenting).

In addition, Petitioners have not shown that the School Board was obligated to create the new position of Janitor absent its agreement with the DOJ. If the School Board had chosen to maintain the status quo, Petitioners could not claim that the actions of the School Board in so doing were adverse to them when there would have been no change in the terms, conditions and/or benefits of their employment. This is exactly the holding of the Fifth Circuit in this case: "Thus, the Board's implementation of the new Janitor position, for which [Petitioners] had a right of first refusal, did not constitute an ultimate employment decision because it did not affect [Petitioners'] job duties, compensation, or level of benefits as Janitor I employees." 320 F.3d at 577 (Pet. App. pp. 41a-42a). The "conflict" about which Petitioners make so much is inapplicable to this case.

In further support of the fact that the alleged conflict among the circuits is a non-issue herein, the School Board would show that a number of the cases cited by Petitioners in their Petition for Writ of Certiorari are inapposite to the issue they are attempting to create.[5] Specifically, the language cited by

---

5. It is also interesting to note that this Court has previously denied certiorari in several of the cases cited by Petitioners in support of their argument. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001) (Pet. App. p. 15 n.16); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997) (Pet. App. pp. 16-17); and *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997) (Pet. App. pp. 9-11).

Petitioners from *Vasquez*, *supra*, as evidence of the "conflict" among the circuits deals with the plaintiff's disparate treatment discrimination claim and not with the plaintiff's claim of retaliation. 307 F.3d at 890 (Pet. App. p. 14 n.15). The dismissal of Vasquez's retaliation claim was affirmed by the Ninth Circuit for failure to exhaust administrative remedies and for failure to show a genuine issue of material fact as to a causal connection between an "assumed" adverse action and the protected activity. *Id.* at 895-897.

In *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998), the Court determined that the plaintiff's complaints "considered collectively. . . . , *for judgment as a matter of law purposes*, ... satisf[y] the adverse employment action requirement for a prima facie case of retaliation." (Emphasis added.). Likewise, in *Richardson*, *supra*, the Court acknowledged that, while a jury might not find that the plaintiff had suffered from a "materially adverse change in the terms and conditions of her employment," the complaints were sufficient for purposes of summary judgment given that the defendant had failed to rebut same. 180 F.3d at 447.

Further, in *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994), the issue on appeal was whether the district court had properly granted the defendant's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Court found, after reviewing various actions found to constitute adverse employment actions, that the plaintiff's complaint on its face stated a claim for relief. 35 F.3d at 16. *See also Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991) (reversal of 12(b)(6) motion to dismiss under ADEA).

Finally, in neither *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000) nor *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996), was the Seventh Circuit dealing directly with the retaliation issue. In *Heuer*, the Court found that the plaintiff had not argued retaliation on appeal so she had waived that claim. 203 F.3d at 1023. In *Knox*, the Court was reviewing a jury instruction regarding retaliation and found the State had not properly objected to the instruction at trial so any objection was waived. 93 F.3d at 1333. The Court of Appeals went on to discuss the "adverse employment action" element of a claim for retaliation but, in both cases, that issue was not before the Court, therefore, the language discussing such is *dicta*. Petitioners' reference to these cases does not support their contention that, because of the "conflict among the circuits", writs should be granted herein.

II. A Disagreement Between Federal Agencies As To The Appropriate Interpretation Of Federal Law Is Not An Adequate Basis For A Grant Of Writ Of Certiorari.

Petitioners argue that another basis for granting their Petition for Writ of Certiorari is the fact that the Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") disagree on how the term "adverse employment action" should be defined in the context of a retaliation claim under Section 704(a) of Title VII. (Pet. App. pp. 21-27). Rule 10 of the Rules of the Supreme Court of the United States, while not exhaustive, does not list a conflict between federal agencies in the interpretation of a law as a basis for the granting of a writ of certiorari. If this Court began granting petitions for writ of certiorari every time there was a disagreement between two federal agencies, the Court's docket would soon become unmanageable.

In addition, a federal agency interpretation of a given law has only persuasive authority in the courts where Congress has not expressly invested that agency with the authority to promulgate rules and/or regulations governing the substantive provisions of that law. *Edelman v. Lynchburg College*, 535 U.S. 106, 122, 122 S. Ct. 1145, 1154, 152 L. Ed. 2d 188 (2002) (O'Connor, Justice, Concurring). *See also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 142, 97 S. Ct. 401, 411, 50 L. Ed. 2d 343 (1976); and *Ray v. Henderson*, 217 F.3d 1234,1243 (9th Cir. 2000). Neither the EEOC nor the DOJ has been given that authority by Congress as regards Title VII. *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 257, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991); *Gilbert, supra*; and *Greenlees v. Eidenmuller Enters.*, 32 F.3d 197, 200 (5th Cir. 1994). The fact that there may be a conflict between the DOJ and the EEOC as to how to interpret Section 704(a) of Title VII is not sufficient grounds for the granting of a writ of certiorari given that the opinions of these two agencies on this issue do not have the "force of law." *Gilbert*, 429 U.S. at 141.

III. The Decision Of The Fifth Circuit In *Banks* Does Not Conflict With This Court's Decision In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Petitioners further argue that writs should be granted in this case because the decision of the Fifth Circuit conflicts with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). This contention also lacks merit.

The issue addressed by this Court in *Robinson* was who qualified as an employee under Section 704(a) of Title VII of the

Civil Rights Act of 1964. 519 U.S. at 339. The Court ultimately held that the term "employees" included both current and former employees for purposes of protection under that section. *Id.* at 346. There was no discussion regarding what qualifies as an "adverse employment action" for purposes of establishing a *prima facie* case of retaliation under Title VII.

Unlike *Robinson*, the decision of the Fifth Circuit in *Banks* did not turn on the issue of whether Petitioners were "employees" entitled to the protection of Section 704(a). At the time Petitioners were offered the opportunity to apply for the new position of Janitor, they were current employees of the School Board. The question presented to the Fifth Circuit in *Banks* was whether Petitioners had produced sufficient evidence to establish a genuine issue of material fact as to whether they had suffered an adverse employment action. This was not the issue in *Robinson*, and Petitioners' reference to it and reliance upon it is misplaced.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari for all or any one of the following reasons, to wit, (1) the alleged conflict among the circuit courts of appeals was not determinative of the issues decided by the Fifth Circuit in *Banks*, *supra*, (2) the alleged conflict between the Department of Justice and the Equal Employment Opportunity Commission is not sufficient grounds for the grant of a writ, and (3) the Fifth Circuit's decision in *Banks*, *supra*, does not conflict with this Court's decision in *Robinson v. Shell Oil Co.*, *supra*.

Respectfully submitted,

KENNETH F. SILLS
Counsel of Record
KAREN D. MURPHY
HAMMONDS & SILLS
1111 South Foster Drive
Suite C
Baton Rouge, Louisiana 70806
(225) 923-3462

Attorneys for Respondents East Baton Rouge Parish School Board, individual School Board members & James Manley

No. 02-1717 (3)

Supreme Court, U.S.
FILED
JUL 11 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JUAN HERNANDEZ,

Petitioner,

v.

CRAWFORD BUILDING MATERIAL CO., etc.,

Respondent.

ROSA MALVEAU, *et al.*,

Petitioners,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

TIMOTHY B. GARRIGAN
STUCKY, GARRIGAN & CASTETTER
2803 North Street
P.O. Box 631902
Nacogdoches, TX 75963-1902
(936) 560-6020

NANCY PICARD
ROBEIN, URANN & LURYE
2540 Severn Avenue
Suite 400
Metairie, LA 70002
(504) 885-9994

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

**Counsel of Record*

11 pp

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF LAW REGARDING WHICH THE COURTS OF APPEALS ARE IN CONFLICT... 1

II. THE CORRECTNESS VEL NON OF THE FIFTH CIRCUIT'S ULTIMATE EMPLOYMENT DECISION DOCTRINE IS DISPOSITIVE OF THIS CASE 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bass v. Board of County Commissioners, Orange County, Fla., 256 F.3d 1095 (11th Cir. 2001) 6

Collins v. State of Illinois, 830 F.3d 692 (7th Cir. 1987) 4

Graham v. State Farm Mutual Insurance Co., 193 F.3d 1274 (11th Cir. 1999) 6

Gupta v. Florida Bd. of Regents, 212 F.3d 571 (11th Cir. 2000) 1

Gupta v. Florida Bd. of Regents, 531 U.S. 1076 (2001) 1, 6

Heuer v. Weill-McLain, 203 F.3d 1021 (7th Cir. 2000) 3, 4

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir. 1996) 3

Mattern v. Eastman Kodak Co., 522 U.S. 932 (1997) 2, 3

Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000) 6

Smart v. Ball State Univ., 89 F.3d 437 (7th Cir. 1996) 4

Smith v. St. Louis University, 109 F.3d 1261 (8th Cir. 1997) 7

Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000) 6

Torres v. Pisano, 522 U.S. 997 (1997) 2, 7

Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001) 7

Wanamaker v. Columbian Rope Co., 108 F.3d 462 (2d Cir. 1997) 7

RULES

Fed. R. Civ. P. 12(b)(6) 3

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF LAW REGARDING WHICH THE COURTS OF APPEALS ARE IN CONFLICT

The petition notes that eleven appellate decisions in four circuits have acknowledged the existence of an inter-circuit conflict regarding the ultimate employment decision doctrine. (Petition, pp. 12-15). Those decisions were written or joined by twenty-three different judges. The *Malveau* respondents[1] do not seriously deny that a well established conflict exists regarding this issue.

The petition notes that the Fifth Circuit has applied its ultimate employment decision doctrine in 12 cases (Petition, pp. 8-10), while the First, Second, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have rejected that doctrine in a total of 41 decisions. (Petition, pp. 10-13). Respondents argue that this Court has denied certiorari in three of this total of 53 decisions. (Brief in Opposition, p. 8 and n. 5). That circumstance obviously does not establish the absence of a conflict. In two of these cases, moreover, the questions presented in the petitions did not raise the issue presented by this case.[2] A related question was raised by the petition

---

[1] The respondent in *Hernandez* waived its right to respond to the petition.

[2] In *Gupta v. Florida Bd. of Regents*, 531 U.S. 1076 (2001), the questions presented were as follows:

> I. Should this Court grant certiorari, vacate and remand, in light of *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. ___, 120 S.Ct. 2097 (2000), a case in which the court of appeals based its reversal of the trial court on evidence rejected by the jury?

(Continued on following page)

in *Mattern v. Eastman Kodak Co.*, 522 U.S. 932 (1997), but at that point in time the now obvious conflict had not yet clearly emerged. *All* of the eleven appellate decisions

---

> II. Does a district court's determination concerning judgment as a matter of law command the same deference as factual findings at bench trials, rulings on motions for new trial, and decisions on preliminary injunctions?
>
> III. Is the existence of a hostile environment a question of fact for the jury or a question of law for an appeals court?

(Petition for Writ of Certiorari, No. 00-726, p. i).

In *Torres v. Pisano*, 522 U.S. 997 (1997), the questions presented were as follows:

> 1. Does a terrified victim of supervisory hostile environment racial and sexual harassment waive her legal protections under Title VII and Title IX against unwelcome and unsolicited pregnancy, racial and sexual harassment because she asked an official of the university to keep the matter confidential, rather than taking immediate action to stop the harassment?
>
> 2. May an employer which has actual notice and constructive notice of the existence of a hostile working environment avoid liability under Title VII and Title IX on the grounds that an official of the institution honored the terrified victim's request to keep the matter confidential, rather than taking immediate action to stop the harassment?
>
> 3. Whether the following facts provide a defense to employer liability under Title VII and Title IX: (1) the victim did not suffer "any serious physical or psychological harm that would have occurred if the employer did not act forthwith"; (2) the victim's letters to the employer's agent recounted only a few relatively minor incidents of harassment; (3) the victim was the only female employee in the supervisor's office at the Dental Center; and (4) there is no indication in the record that any other employees were being harassed by the supervisor in violation of Title VII?

(Petition for Writ of Certiorari, No. 97-578, p. i).

recognizing that conflict were issued after the denial of certiorari in *Mattern*.

Of the 41 appellate decisions rejecting the Fifth Circuit's ultimate employment decision doctrine, respondents attempt to distinguish only seven. Respondents' analysis of even these seven decisions is unpersuasive. Respondents object, for example, that in several of these cases the interpretation of Title VII (or other federal anti-retaliation law) arose in a motion for summary judgment,[3] a motion for judgment as a matter of law,[4] or a Rule 12(b)(6) motion to dismiss for failure to state a claim.[5] But since the question presented in all of those cases, as here, is purely an issue of law, the procedure used to raise the issue is simply irrelevant. Respondents' descriptions of the legal issue decided in several other cited cases is not correct.[6]

---

[3] Brief in Opposition, p. 9 (*citing Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 447 (2d Cir. 1999)).

[4] Brief in Opposition, p. 9 (*citing Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998)).

[5] Brief in Opposition, p. 9 (*citing Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994), and *Passert v. American Chemical Society*, 935 F.2d 322 (D.C.Cir. 1991)).

[6] Respondents assert that "in neither *Heuer v. Weill-McLain*, 203 F.3d 1021 (7th Cir. 2000) nor *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996), was the Seventh Circuit dealing directly with the retaliation issue." (Brief in Opposition, p. 10). To the contrary, that was precisely one of the issues in both cases.

Respondents next argue, quite inconsistently, that although those cases do indeed decide the scope of federal anti-retaliation provisions, that portion of the opinions was dicta. (Brief in Opposition, p. 10). *Heuer* as well as *Knox* rests on two distinct grounds. *Knox* holds both that the instruction in question correctly construed section 704 of Title

(Continued on following page)

II. THE CORRECTNESS VEL NON OF THE FIFTH CIRCUIT'S ULTIMATE EMPLOYMENT DECISION DOCTRINE IS DISPOSITIVE OF THIS CASE

Respondents assert that "[n]o matter which definition is used, the actions complained of by Petitioners do *not* qualify as adverse employment actions." (Brief in Opposition, p. 7) (Emphasis in original). To the contrary, that could not literally be true in this, or indeed any other case. In all cases, the question of whether an employer's practices "qualify as adverse employment actions" necessarily turns at least in part on how "adverse employment actions" are defined. In this case that legal definition is the *only* issue, since as respondents acknowledge the relevant facts are undisputed. (Brief in Opposition, p. 3).

The Fifth Circuit's ultimate employment decision doctrine defines "adverse employment actions" in a manner which excludes the retaliatory practices in this and many other cases. The court of appeals concluded that there was no ultimate employment decision in *Banks* (now *Malveau*), and thus no adverse employment action, because the petitioners were permitted to remain in their part-time Janitor I jobs, with no change in their "job

---

VII, and that the defendant had adequately objected to that instruction. 93 F.3d at 1333. *Heuer* holds both that the retaliation complained of was serious enough to violate Title VII, and that the plaintiff had failed to assert that the employer (rather than a co-worker) was responsible for the retaliation. 203 F.3d at 1023. Where a decision rests on two independent grounds, neither portion of the opinion can be dismissed as dicta. In any event, the same interpretation of Title VII can be found in two other Seventh Circuit decisions. *Smart v. Ball State Univ.*, 89 F.3d 437, 440 (7th Cir. 1996); *Collins v. State of Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987). Respondents do not contend that the holdings in these cases are dicta.

duties, compensation, or level of benefits." (Pet. App. 42a). Their level of compensation held steady at about 38% of the wages of the full-time male janitors;[7] because petitioners had no benefits to start with, their "level of benefits" was not reduced.

Respondents insist that locking the petitioners into these part-time no-benefit jobs was not an "adverse employment action" because it maintained "the status quo" regarding the level of compensation and benefits for Janitor I jobs. (Brief in Opposition, p. 8). The exclusion of petitioners from the full-time Janitor jobs, respondents argue, was not "adverse to Petitioners" since they had not been promised, and had no legal entitlement to, those particular jobs. (Brief in Opposition, p. 7). The Fifth Circuit indeed held, and respondents insist, that the practices which locked Malveau and the other petitioners into the part-time Janitor I jobs were therefore not "adverse employment actions."

That holding and contention are assuredly about the legal definition of an adverse employment action. The actual financial consequences of the disputed practices themselves are not in dispute; petitioner Malveau, for example, who earned approximately $8,500 a year as a Janitor I, would have made more than $22,000 a year as a Janitor. The promotion rules which prevented Malveau from becoming a full-time Janitor obviously caused serious financial injury. The Fifth Circuit held that that injury

[7] Almost all of the male janitors worked full-time year round. The petitioners worked *half time* for nine months of the year, or 37.5% of the hours of the full-time men.

was not actionable because the particular retaliatory employment scheme involved did not constitute an "ultimate employment decision." That same financial injury would have been actionable in the Fifth Circuit if Malveau had been *de*moted from Janitor to Janitor I, rather than being prevented from *pro*moting from Janitor I to Janitor.

No other circuit limits the protections of federal anti-retaliation statutes to changes in the "duties, compensation or level of benefits" of a worker's *current* position. The Ninth Circuit construes Title VII to forbid any retaliatory practice "likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The employment practices in this case, which prevented workers from promoting from part-time to full-time work, would obviously have just such a deterrent effect. *See id.* at 1241 (retaliatory denial of promotions or job references both actionable). The Eleventh Circuit interprets Title VII to bar any retaliatory measure which "deprives [the employee] of employment *opportunities*," *Bass v. Board of County Commissioners, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001) (emphasis added), or which has other negative "repercussions." *Graham v. State Farm Mutual Insurance Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999). The measures in this case, which prevented the petitioners from moving into jobs that would have more than doubled their income, clearly met that standard. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (retaliatory denial of pay raise actionable under section 704 of Title VII); *Spearman*

v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (same).

The Second, Fourth and Eighth Circuits have held, as the respondents note,[8] that the retaliatory action must adversely affect the "terms and conditions of employment" of the plaintiff. But none of these circuits limit "adverse employment action" to changes in the duties, compensation and benefits of the particular *job* a plaintiff holds; to the contrary, all of these circuits construe federal anti-retaliation laws to forbid adverse actions unrelated to a plaintiff's current position. *E.g., Von Gunten v. State of Maryland*, 243 F.3d 858, 864-65 (4th Cir. 2001) (anti-retaliation provision of Title VII covers retaliatory denial of a promotion); *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) (retaliatory adverse references actionable; "post-employment blacklisting is sometimes more damaging than on-the-job discrimination."); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (retaliatory refusal to write a recommendation letter for former employee may cause actionable injury to "tangible *future* employment objectives" even though it would not adversely affect the former employee's "current employment situation.") (Emphasis in original).

If this action had arisen in any of these other circuits, the (largely undisputed) allegations would have been sufficient to state a claim of unlawful retaliation. Only application by the Fifth Circuit of its widely disapproved

---

[8] Brief in Opposition, pp. 6-7 (*citing Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997), *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), and *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)).

ultimate employment decision doctrine led to a contrary result in this case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgments and opinions of the court of appeals.

Respectfully submitted,

TIMOTHY B. GARRIGAN
STUCKY, GARRIGAN & CASTETTER
2803 North Street
P.O. Box 631902
Nacogdoches, TX 75963-1902
(936) 560-6020

NANCY PICARD
ROBEIN, URANN & LURYE
2540 Severn Avenue
Suite 400
Metairie, LA 70002
(504) 885-9994

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

**Counsel of Record*